

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Greenwood County
Hon. Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2021-000941

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S.C. SUPREME COURT

The State,

Respondent,

v.

Corey Jermaine Brown,

Petitioner.

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

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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STATEMENT OF QUESTIONS PRESENTED

I. The Court of Appeals properly reversed the trial court's grant of a new trial for Corey Brown when there was no evidence in the record supporting a conclusion the State failed to turn over plea offers made in exchange for the testimony of one of Brown's co-defendants. The co-defendant merely harbored a belief he could get a better deal by testifying, and this is insufficient to constitute evidence the State was required to turn over.

STATEMENT OF THE CASE

Procedural History

Corey Brown was indicted on charges of armed robbery, kidnapping, conspiracy to commit armed robbery/kidnapping, and conspiracy to commit grand larceny. The jury found him not guilty on the conspiracy to commit armed robbery/kidnapping. The jury convicted him of armed robbery, kidnapping, and conspiracy to commit grand larceny. The judge sentenced Brown to a total of twenty-five years in prison. On August 25, 2014, Brown filed a Motion for New Trial. The circuit court granted the motion by Order Granting New Trial filed June 1, 2018. The State received written notice of the Order on June 28, 2018, and filed a timely Notice of Appeal on June 9, 2018.

Following briefing, the Court of Appeals reversed the grant of a new trial, but remanded to Judge Griffith for specific findings “on what basis the court is granting a new trial.” State v. Brown, Op. No. 2021-UP-253 (S.C. Ct. App. filed July 7, 2021). Both parties served and filed a Petition for Rehearing, and both were denied by the Court of Appeals on July 29, 2021.

Brown served and filed a Petition for Writ of Certiorari on August 30, 2021. This Return follows.

ARGUMENT

- I. **The Court of Appeals properly reversed the trial court's grant of a new trial for Corey Brown when there was no evidence in the record supporting a conclusion the State failed to turn over plea offers made in exchange for the testimony of one of Brown's co-defendants. The co-defendant merely harbored a belief he could get a better deal by testifying, and this is insufficient to constitute evidence the State was required to turn over.**

The Court of Appeals correctly found the circuit court erred in granting a new trial when there is **no** evidence in the record supporting the conclusion the State had reached a deal with Brown's testifying co-defendants. The only evidence in the record demonstrates a plea offer was extended to one of the co-defendants, which was turned down. The only other evidence presented showed the co-defendant hoped to obtain a favorable sentence and have charges dropped by testifying against Brown, but never indicated an actual deal was reached with the Solicitor's Office. As a result, the circuit court abused its discretion in granting the new trial because none of the evidence rose to the level required for disclosure by the State under Brady v. Maryland, 373 U.S. 83, 87 (1963), or Giglio v. United States, 405 U.S. 150, 153 (1972).

Standard of Review

In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "A trial judge has the discretion to grant or deny a motion for a new trial, and his decision will not be reversed absent a clear abuse of discretion." State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001).

Merits

The trial court's order grants a new trial primarily based on the State's alleged failure to disclose a rejected plea offer and additional negotiations to the defense. The circuit court found two disclosures should have been made: 1) the initial offer of thirteen years to Evans, which was ultimately rejected by Evans well in advance of Brown's trial; and 2) "the discussions the solicitor had with Evans and his attorney" leading to Evan's belief "if he testified, the State would present him a more favorable offer allowing him to plead guilty to a non-violent offense instead of to his original violent offenses." While not explaining the basis for its ruling, the trial court appears to be relying on analysis similar to that of Brady and Giglio.

Thus, an individual asserting a Brady violation must demonstrate the evidence was (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) suppressed by the State; and (4) material to the accused's guilt or innocence, or was impeaching. Kyles v. Whitley, 514 U.S. 419, 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998) ("[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (alteration by court) (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)) (internal quotation marks omitted)); see also, State v. Anderson, 407 S.C. 278, 287, 754 S.E.2d 905, 909 (Ct. App. 2014).

It is well established that an **express agreement** between the prosecution and a witness is possible impeachment material that must be turned over under Brady. See Giglio, 405 U.S. at 154–55. In Giglio, the Supreme Court held that "evidence of any understanding or agreement as

to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.” Id. at 155. The existence of a less formal, unwritten or tacit agreement may also be subject to Brady’s disclosure mandate. See e.g., Wischart v. Davis, 408 F.3d 321, 323–24 (7th Cir. 2005). “But not everything said to a witness or to his lawyer must be disclosed. . . . Some promises, agreements, or understandings do not need to be disclosed, because they are too ambiguous, or too loose or are of too marginal a benefit to the witness to count.” Tarver v. Hopper, 169 F.3d 710, 717 (11th Cir. 1999).

The Fifth Circuit Court of Appeals acknowledged there is no “Supreme Court decision holding that the subjective beliefs of the witnesses regarding the possibility of future favorable treatment are sufficient to trigger the State’s duty to disclose under Brady[] and Giglio” Hill v. Johnson, 210 F.3d 481, 486 (5th Cir. 2000). A defendant’s “general and hopeful expectation of leniency is not enough to create an agreement or an understanding.” Collier v. Davis, 301 F.3d 843, 849 (7th Cir. 2002); see also, Hudson v. State, 277 Ga. 581, 586(5), 591 S.E.2d 807 (2004) (“That [the witness] may have expected help for his cooperation does not establish that a deal or agreement was made between him and the State.” (Citation omitted.)). Further, “[t]he [Giglio] rule does not address nor require the disclosure of all factors which may motivate a witness to cooperate. The simple belief by a defense attorney that his client may be in a better position to negotiate a reduced penalty should he testify against a codefendant is not an agreement within the purview of Giglio.” Alderman v. Zant, 22 F.3d 1541, 1555 (11th Cir.1994). “The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, provided that it does not promise anything to the witnesses prior to their testimony.” Shabazz v. Artuz, 336 F.3d 154, 165 (2d Cir. 2003). Additionally, “Giglio does not require disclosure of rejected plea offers;

the duty to disclose is dependent upon the existence of an agreement between the witness and the government.” United States v. Rushing, 388 F.3d 1153, 1158 (8th Cir. 2004).

The first alleged Brady and Giglio violation was on the basis of the State failing to disclose the rejected plea offer. As the Eighth Circuit Court of Appeals explained, there is no requirement to disclose a rejected plea offer. Logically, there would be no reason to disclose a plea offer which the witness rejected. The reason Giglio requires disclosure is because the witness is receiving something in exchange for their testimony and the defendant is allowed to confront the witness on that possible bias or motive to lie. See e.g., Giglio, 405 U.S. at 154. “When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule [of Brady].”); State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012) (finding the avoidance of a mandatory minimum as a result of providing cooperating testimony is “critical information that a defendant must be allowed to present to the jury.”). In a situation in which the witness specifically declines the alleged reward from the State, it is impossible to allege he is testifying on the basis of an agreement that is not in effect. Accordingly, the trial court committed an error of law in finding the State had a duty to disclose the rejected plea offer to one of Brown’s co-defendants.¹

The second ground for granting the new trial was the failure to disclose alleged discussions between the State, Evans, and Evans’ counsel. The trial court does not find the discussions resulted in any type of agreement or understanding. Instead, he merely finds the discussions lead to a belief by Evans that he would receive favorable treatment in exchange for his testimony. Significantly, during the motion hearing, counsel for Brown specifically

¹ It should also be noted that the 13 year plea agreement which the State did not disclose contained no provision regarding the testimony of Evans against Brown. It was merely a plea offer to avoid trial and not one contingent upon his testimony. (10/6T. 4; R. 493).

acknowledged there is no evidence the State told Evans what to expect in return for testifying.

She stated:

And on some of the these recordings -- and, again, you know, **this is Mr. Evans's perception, I'm not suggesting that Mr. Taylor or Ms. White told him this**, but in one of the recording he says ten years is the worst I'm looking at, it's nonviolent. Thirteen was my first offer, but then I cut a deal and -- if I cut a deal, I get nonviolent. You know, that's in several of the different recordings.

(10/6T. 18; R. 507) (emphasis added). The trial court interjects: "And that may be conversations that his lawyer is saying if you testify, maybe I can get you nine, and that doesn't involve the State." Counsel for Brown then admitted: "Exactly, and that's -- exactly. And that's why I say I'm not saying that that's -- I'm just telling the Court what information I heard on the recordings." (10/6T. 18; R. 507).² The trial court never finds an agreement, explicit or implicit, existed between the State and Evans which exchanged his testimony for lighter charges and sentencing. Instead, he found merely "discussions" had occurred which lead to Evans' belief he would receive lighter sentence and charges. (Order for New Trial, p.2; R. 527). These possible discussions, or Evans' beliefs about what he might receive or a benefit he might get by testifying, are clearly insufficient to require disclosure under either Brady or Giglio. Accordingly, the trial court erred in finding a new trial warranted under these circumstances.

To the extent the trial court's Order granting a new trial is based on allegedly false testimony by Evans', nothing in the record supports the conclusion Evans testified falsely. At Brown's trial, Evans was asked whether he had been promised any deals to testify. He indicated he did not have a deal to testify. (T.218; R. 231). This was an entirely honest response.

² The audio recordings demonstrate exactly what Brown's counsel indicated, Evans had a belief he would be obtaining a better sentence but there was no promise made and no agreement in place in exchange for his testimony. The audio recordings were not made an exhibit but were clearly before the trial court for consideration in making its ruling. (10/6T. 8; R. 497). Additionally, the court referenced the recordings in its ruling. (Order for New Trial p.2; R. 527).

Brown cites to Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976), as an example of an expectation being sufficient to trigger Brady and Giglio. Brown cites it for the proposition: “Finally, we note that rather than weakening the significance for credibility purposes of an agreement of favorable treatment, tentativeness may increase its relevancy.” Boone, 541 F.2d at 451. The Boone case is clearly inapposite to the facts of this case. In Boone, a police officer promised “he would not arrest the [co-defendant] for the Sandler burglary or for any other offenses which he knew [the co-defendant] to have committed, and that he would use his influence with the Commonwealth Attorney in order to see that he would not be prosecuted.” Id. at 449. These facts are very different than the expectation Evans maintained in this case, which was not the result of any statement or promise by anyone on behalf of the State. The remainder of the quote from Boone that is omitted by Brown in his brief, is also very instructive. The Court explained its statement that the tentativeness may increase the relevancy of the promise made by indicating: “This is because a **promise to recommend leniency** (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor.” Id. at 451 (emphasis added). As discussed, there was no promise of leniency in this case. There is **no evidence** in this record the State ever offered Evans any consideration in exchange for his testimony against Brown.

Even if one considered the rejected plea offer a deal, it was **not** contingent in any way on Evans providing testimony against Brown. Further, while it is clear from the record that Evans hoped and believed he would receive a beneficial sentence as a result of his cooperation, there was no deal or promise in exchange for his testimony. As a result, there is simply no evidence in

the record to support a conclusion that Evans presented false testimony by indicating he did not have a deal in exchange for his testimony.

Accordingly, the trial court abused its discretion in granting a new trial based on the State's failure to turn over evidence of a rejected plea offer, discussions with Brown, and the Brown's belief he would receive a benefit for testifying. None of these are required to be disclosed under existing case law. Further, there are simply no facts in the record to support the trial court's conclusions regarding the need for a new trial or the basis of a new trial.

Finally, even if the rejected plea and Evans' expectations should have been turned over to the defense for use in impeaching the testimony, the impeachment was not material or sufficient for the grant of a new trial because Evans' testimony was not the sole testimony linking Brown to the crimes. Testimony by both the victim and another co-defendant placed Brown as one of the four who were directly involved in the armed robbery and kidnapping. (T. 137-139; 145-146; R.150-152; 158-159). As a result, Evans' credibility was not central to the State's case and significant other testimony in the record provided the same evidence connecting Brown to the crime. Even if the testimony would have been impeaching and should have been disclosed, it would not reasonably have impacted the outcome of the trial because of the other testimony in the record.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals and allow the Court of Appeals remand to the trial court to stand.

Respectfully submitted,

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