STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

APPELLANT,

V.

COREY JERMAINE BROWN,

RESPONDENT.

APPELLATE CASE NO. 2018-001289

FINAL BRIEF OF RESPONDENT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1.

The circuit court erred in granting Respondent a new trial. There is no evidence in the record to support the court's conclusion the State made an offer to Respondent in exchange for his testimony. The co-defendant's belief he could obtain a better deal if he testified is insufficient to constitute evidence the State had to turn over.

2.

To the extent the circuit court's ruling can be read to have granted the new trial on the remaining grounds raised in the motion for a new trial, the court failed to make proper findings of fact and none of the issues raised warranted a new trial.

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

1.

Where the solicitors admitted that plea offers extended to the testifying co-defendant were not disclosed to the defense, ample evidence supports the court's grant of a new trial.

2.

This Court need not reach appellant's second issue because it should affirm on the first issue raised. Alternatively, respondent agrees with the State that the order below is insufficient and the case should be remanded for specific factual findings and conclusions of law only as to these issues.

STATEMENT OF THE CASE

On August 12, 2014, Respondent 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 Respondent Corey Brown. R. 14. Respondent's co-defendant who was tried in absentia, Christopher Johnson, was represented by Billy Nicholson. R. 14. The jury convicted Respondent of conspiracy to commit grand larceny, armed robbery, and kidnapping and acquitted Respondent of conspiracy to commit armed robbery and kidnapping. R. 472, ll. 13 – 23. Judge Griffith sentenced Respondent to a total of twenty-five years' imprisonment. R. 488, ll. 1 – 4. After hearing Respondent's motion for a new trial on October 6, 2014, Judge Griffith granted Respondent a new trial in a written order filed June 1, 2018. R. 526. The State appealed to this Court.

STANDARD OF REVIEW

Respondent agrees with the State that the case is reviewed for an abuse of discretion and that factual findings are binding unless clearly erroneous.

ARGUMENT

1.

Where the solicitors admitted that plea offers extended to the testifying co-defendant were not disclosed to the defense, ample evidence supports the court's grant of a new trial.

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 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.

Evans testified that he had known Respondent for a long time and that Respondent 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.

Respondent 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. Respondent 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. Respondent'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.

Respondent received twenty-five years' imprisonment for kidnapping and armed robbery. R. 487, l. 25 – 488, l. 4. Judge Griffith granted Respondent ten days to make post-trial motions. R. 176, ll. 9 – 14. Respondent 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. Respondent 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 Respondent's counsel did not know "the whole timeline of it" but also claimed he explained to defense counsel that Evans would be testifying against Respondent. 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 Respondent 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.

These factual findings are entitled to deference from this Court and show that Judge Griffith acted within his discretion in granting Respondent 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 Respondent. 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.

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.") 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. 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 we waived presentment and pled guilty in a different county.

Appellant requested deals made with any witnesses in her discovery motion. R. 495, ll.

10 – 17. R. 530. In a case cited at the hearing by Respondent, 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. Substantial evidence supports Judge Griffith's ruling and this Court should affirm.

2.

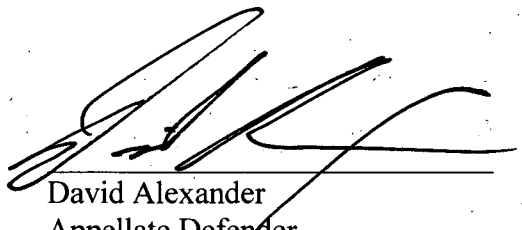
This Court need not reach appellant's second issue because it should affirm on the first issue raised. Alternatively, respondent agrees with the State that the order below is insufficient and the case should be remanded for specific factual findings and conclusions of law only as to these issues.

As shown above, Judge Griffith's ruling was correct and supported by the evidence. This Court should affirm based on this ruling regarding the nondisclosure of plea negotiations. Affirming on this basis, the Court would not need to reach Appellant's second issue on appeal.

However, should this Court determine it should reverse on that ground, Respondent agrees with the State that this case should be remanded for clarification of the lower court's order and specific findings. The order can be read as granting a new trial based on several issues briefly listed in the order's penultimate paragraph. R. 528. However, as the State points out, the trial judge did not make specific findings or conclusions on these points. Respondent agrees that the case should be remanded, **but only if it becomes necessary to reach these issues**. Affirming the lower court's correct ruling concerning the nondisclosure of the plea negotiations would make such a remand unnecessary.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be affirmed.



This 9th day of March, 2020.

David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

March 9, 2020.

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT