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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenwood County
Eugene C. Griffith, Circuit Court Judge

Opinion No. 2021-UP-253 (S.C. Ct. App. filed July 07, 2021)

THE STATE,

RESPONDENT,

V.

COREY JERMAINE BROWN,

PETITIONER.

APPELLATE CASE NO. 2021-000941

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Corey Jermaine Brown, Respondent.

Appellate Case No. 2018-001289

Appeal From Greenwood County
Eugene C. Griffith, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-253
Submitted May 3, 2021 – Filed July 7, 2021

REVERSED and REMANDED

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor David Matthew Stumbo, of Greenwood; all for Appellant.

Appellate Defender David Alexander, of Columbia, for Respondent.

PER CURIAM: Corey Brown was convicted of armed robbery, kidnapping, and conspiracy to commit grand larceny. Brown filed a motion for new trial, which was granted by the trial court. The State appeals, arguing (1) the trial court erred

in granting a new trial when there was no evidence in the record to support the conclusion the State reached a deal with Brown's testifying co-defendants and (2) the trial court's ruling can be construed to include a grant of a new trial on several additional grounds originally raised in Brown's motion for a new trial, and because none of the grounds raised support a grant of a new trial, the trial court erred in granting a new trial. We reverse and remand.

FACTS

Brown filed a motion for new trial, arguing evidence discovered after the trial showed the State made a plea offer to one of the testifying co-defendants prior to Brown's trial, which was never disclosed to Brown and contradicts testimony the State presented. During Brown's trial, the State called two co-defendants, Shadarron Evans and Antonio Nicholson. Both testified the State did not make them any offers and had not promised them anything in exchange for their testimony. However, after his trial, Brown learned the State extended an offer to Evans. Brown provided recordings of Evans' phone calls from the Greenwood County Detention Center that were discovered after trial but recorded beforehand. The recordings disclosed the State initially offered Evans thirteen years, but he rejected the offer after meeting with his attorney and a solicitor because he believed if he testified the State would present him a more favorable offer allowing him to plead guilty to a non-violent offense instead of his original violent offenses. The State did not disclose to Brown or the court its offer to Evans or the discussions the solicitor had with Evans and his attorney. The trial court granted Brown a new trial, finding the failure to disclose this material evidence prejudiced him. This appeal followed.

STANDARD OF REVIEW

The grant of a new trial motion rests within the discretion of the trial court, and this court will not disturb its decision on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009). "Therefore, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous." *State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). Thus, "this [c]ourt is limited to determining whether the trial court abused its discretion." *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Accordingly, "[t]his [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Id.*

LAW/ANALYSIS

The State argues the trial court erred in granting a new trial because there was no evidence in the record to support the conclusion that the State reached a deal with Brown's testifying co-defendant. We agree.

"[T]he 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, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "In South Carolina, 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." *State v. Moses*, 390 S.C. 502, 515, 702 S.E.2d 395, 402 (Ct. App. 2010). "Evidence considered favorable to the defendant includes both exculpatory and impeachment evidence and extends to evidence that is not in the actual possession of the prosecution, but also to evidence known by others acting on the government's behalf, including the police." *Id.* at 517, 702 S.E.2d at 403. "[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." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Courts do not "automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . .'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968)). "A finding of materiality of the evidence is required under *Brady*." *Id.* In *Giglio*, the Supreme Court found the government's case depended almost entirely on the testimony of its key witness; thus, the credibility of the witness was an important issue in the case, and "evidence of any understanding or agreement as to a future prosecution was relevant to his credibility and the jury was entitled to know of it." *Id.* at 155.

"[N]ot everything said to a witness or to his lawyer must be disclosed." *Tarver v. Hopper*, 169 F.3d 710, 717 (11th Cir. 1999). "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." *Id.* "The [*Giglio*] rule does not address nor require the disclosure of all factors which may motivate a witness to cooperate." *Alderman v. Zant*, 22 F.3d 1541, 1555 (11th Cir. 1994).

"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 co[-]defendant is not an agreement within the purview of *Giglio*." *Id.*

In *Tarver*, the defendant argued a plea agreement existed between his co-defendant and the prosecution. 169 F.3d at 716. He asserted the government's failure to disclose that agreement violated *Giglio*. *Id.* The co-defendant testified at trial that he was not promised a deal. *Id.* at 717. The prosecuting district attorney testified that no "arrangement or deal" existed—only that the co-defendant's testimony would be "taken into consideration." *Id.* The court found such a statement was too preliminary and ambiguous to demand disclosure; thus, the court held the co-defendant's attorney and the co-defendant were merely trying to cooperate in hopes of improving their bargaining position later, and *Giglio* required no disclosure. *Id.* Further, "*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 trial court's order states:

> Brown argued the court should grant a new trial because evidence discovered after the trial showed the State made a plea offer to at least one of the testifying co-defendants prior to [Brown's] trial, which was never disclosed to [Brown] and which contradicts testimony the State presented. The State called two co-defendants, Shadarron Evans (Evans) and Antonio Nicholson (Nicholson). Both testified that the State had not made them any offers or promised them anything in exchange for their testimony.
>
> After his trial, [Brown] learned that the State extended an offer to Evans. He provided proof through recordings of Evans' phone calls from the Greenwood County Detention Center, discovered after trial but recorded beforehand, that reveal the State initially offered Evans thirteen years. But after meeting with his attorney and a solicitor, Evans believed 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. The State did not disclose to [Brown], or the tribunal, its offer to Evans or the discussions the solicitor had with Evans and his attorney.
>
> Evans' pretrial prediction about the resolutions of his charges, captured on the recorded phone calls, came to fruition just ten days after [Brown's] trial. On August 26, 2014, the State transported Evans to another county where he pleaded guilty to two nonviolent offenses. Criminal Conspiracy and False Imprisonment (a direct indictment to which he waived presentment to the grand jury). Evans was sentenced to 4 years for criminal conspiracy and a consecutive suspended sentence for false imprisonment. As part of [its] plea deal, the State dismissed Evans' indictments for Kidnapping and Armed Robbery. Failing to disclose this material evidence prejudiced [Brown].
>
> . . . .
>
> The Court grants [Brown's] motion for a new trial based on the foregoing and the evidence and arguments presented in the motion for a new trial and subsequent hearing.

The State maintains the only evidence in the record was a plea offer that was extended to Evans, and he turned it down. The State claims the only other evidence presented was that Evans hoped to obtain a favorable sentence and have his charges dropped, but an actual deal was never reached with the solicitor's office. Furthermore, the State argues the trial court's order seems to grant a new trial primarily based on the State's alleged failure to disclose a plea offer and negotiations to the defense. The court's order does not state what case law it was relying on for the basis of its ruling. The State argues it appears the trial court relied on *Brady* and *Giglio* in making its decision but the order did not cite to either case.

We find the court made no specific findings as to whether the evidence was material to Brown's guilt under *Brady* and likely to have changed the verdict under *Giglio*. In addition, the order does not cite to any case law. Thus, we reverse and remand to the trial court to make specific findings on what basis the court is

granting a new trial. We decline to address the State's remaining arguments because this issue is dispositive. *See Berberich v. Jack*, 392 S.C. 278, 294, 709 S.E.2d 607, 616 (2011) (stating that due to the court's reversal and remand on other grounds, the court need not address the appellant's remaining issues).

CONCLUSION

Accordingly, the decision of the trial court is

REVERSED and REMANDED.[1]

WILLIAMS, THOMAS, and HILL, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenwood County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case Tracking Number 2018-001289

The State, Appellant,

v.

Corey Brown, Respondent.

PETITION FOR REHEARING

On July 7, 2021, this Court reversed and remanded the trial court's decision granting Brown a new trial. This Court misapprehended or overlooked the impact of the evidence and its own factual findings. Given this Court's acknowledgement that the only evidence in the record was not of a nature which must be turned over to the defense for use at trial, there was no basis as a matter of law for a grant of a new trial. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find as a matter of law the circuit court erred in granting a new trial based on the evidence in the record, and reverse the grant of a new trial without the need for a further remand.

This Court correctly determined the only evidence in the record was a rejected plea agreement and Evans' hope and belief he would receive a more lenient sentence if he testified against Brown. There is no evidence, and Brown has pointed to no evidence, demonstrating any agreement was reached between Evans and the solicitor—or even that there were sufficient discussions which could be construed as an agreement between Evans and the solicitor.

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).

No case law has been presented at the hearing or on appeal by able counsel that would require turning over a rejected plea or a testifying co-defendant's hopes and subjective desire for a better deal. There is no evidence in this case which could be found to have been required to be disclosed by the State which was not disclosed, and, as a result, there is no basis for remanding to the circuit court. This Court should make the determination that the evidence it found in the

record was insufficient as a matter of law to constitute material evidence for a determination of guilt or innocence. Additionally, this Court should make the determination that disclosure was not appropriate or necessary and so there was no violation warranting a new trial as a matter of law. Therefore, this Court should reverse the grant of a new trial and reinstate Brown's convictions and sentences.[1]

In the alternative, if this Court believes a remand is necessary, it should clarify its opinion. The Court remanded "to the trial court to make specific findings on what basis the court is granting a new trial." This Court should clarify that on remand the trial court may determine, consistent with the findings in this Court's opinion that there was no evidence of any deal or other agreement with Evans necessitating disclosure to the defense, a new trial should not be granted. This Court should specifically note the circuit court is not locked into a finding of a grant of a new trial, but instead to reconsider his finding in its entirety in light of this court's conclusion that there "was no evidence in the record to support the conclusion that the State reached a deal with Brown's testifying co-defendant."

[1] The State craves reference to its brief for a more detailed discussion to the extent one is warranted.

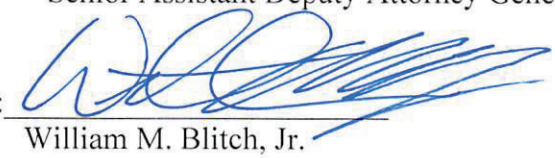
CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the trial court erred in granting a new trial and reinstate Brown's convictions and sentences. In the alternative, if this Court believes remand is necessary, the remand should allow the trial court to fully reconsider its ruling in light of this Court's holding that there was no evidence of a deal and allow for the possibility that the circuit court could ultimately deny the motion for a new trial.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

BY: 
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ATTORNEYS FOR APPELLANT

July 20, 2021

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenwood County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case Tracking Number 2018-001289

The State, Appellant,

v.

Corey Brown, Respondent.

PROOF OF SERVICE

I, Leigh Ann Stone, certify that I have served the within Petition for Rehearing by emailing a copy to Appellant's counsel of record, David Alexander, at his primary email address as provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 20th day of July, 2021.

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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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PO Box 11589
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ATTORNEY FOR RESPONDENT

This 21st day of July, 2021.

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

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

South Carolina Commission on Indigent Defense
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PO Box 11589
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ATTORNEY FOR RESPONDENT

The South Carolina Court of Appeals

The State, Appellant,

v.

Corey Jermaine Brown, Respondent.

Appellate Case No. 2018-001289

ORDER

After careful consideration of Appellant's petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
William M. Blitch, Jr., Esquire
David Alexander, Esquire
David Matthew Stumbo, Esquire
The Honorable Eugene C. Griffith, Jr.

The South Carolina Court of Appeals

The State, Appellant,

v.

Corey Jermaine Brown, Respondent.

Appellate Case No. 2018-001289

ORDER

After careful consideration of Respondent's petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
William M. Blitch, Jr., Esquire
David Alexander, Esquire
David Matthew Stumbo, Esquire
The Honorable Eugene C. Griffith, Jr.