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

The State, Respondent,

v.

Corey J. Brown, Petitioner.

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

BRIEF OF RESPONDENT

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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. On August 15, 2014, 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 July 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, and the State's Return followed. On January 13, 2022, this Court granted the Petition for Writ of Certiorari. Brown served and filed his Brief of Petitioner on February 24, 2022. This Brief of Respondent follows.

Factual Background

On July 26, 2013, Latavius Spearman was kidnapped and robbed. After leaving work at 2:30 AM he went to a friend's house to talk cars and fixing cars. Spearman drove a Chevrolet Caprice with large rims and tires that he purchased shortly before July 26. (R.113-115). While

at his friend's, he saw a silver or gray Camry drive by several times but did not really pay attention to it. (R.115-116).

After leaving, he returned to his apartment complex around 3:30 or 4:00 in the morning. As he was walking to his apartment from the parking lot, he saw a guy walking towards him. (R.117). At that time, he looked and saw a red beam on his chest, and the guy indicated: "You know what it is." The man then led Spearman to his car, where another man appeared. They ordered him to empty his pockets, get in the car, and drive out of the complex. (R.118-120). The gray Camry pulled out and Spearman was told to follow the other car. (R.121).

After a while, Spearman was ordered out of the driver's seat and into the backseat. (R. 123). The vehicles stopped multiple times with people switching vehicles and moving around in the vehicles. They even attempted to place Spearman in the trunk of his car at one point. (R.123-128). The vehicles stopped to get gas, and one of the occupants who Spearman knew—Shadarron Evans—got out. When he got out, Spearman grabbed the gun from the person in the back seat and they began wrestling over the gun. Spearman bit the man on the head and the man bit Spearman on the arm. The gun went off, but no one was hit. (R.128-130).

After the gun went off, the driver panicked and tried to leave the gas station. He hit the gray Camry while trying to leave. (R.135). Spearman ran to the store, while the other occupants of the vehicle ran towards the road. (R. 136-137). Evans, who was in the store still, claimed to be a victim and that his car got hit. (R.139). Antonio Nicholson, another co-defendant, was also in the store and stayed with Evans to speak with police. (R.140-141).

Spearman was originally unable to identify Brown from a lineup. When asked if he could identify him during trial, however, he was able to identify him as the person driving the car. (R.152).

Antonio Nicholson knew Christopher Johnson and made plans with him to go from Georgia to Greenwood, South Carolina, to steal some cars to take back to Georgia to part out to other cars. (R.157-158). Nicholson indicated Brown was one of the people, along with Evans and a person named Tee, that travelled from Georgia to Greenwood to steal the cars with Johnson. (R. 158). They travelled to Greenwood in Nicholson's ex-wife's car—a gray Toyota Camry. (R.159-160).

Nicholson indicated Johnson was the one that knew Spearman and where he lived. Johnson directed Brown and Tee where to stay at the apartment complex while waiting for Spearman. (R.163-165). He and Evans drove out of the complex and the others followed in Spearman's vehicle. Later, the cars slowed and Evans jumped out and went to the car with Spearman, and Johnson got in the car with Nicholson. The cars stopped again, and Brown and Tee wanted to put Spearman in the trunk. Instead, they drove to a gas station and stopped. Spearman's vehicle collided with Nicholson's vehicle. Nicholson and Evans stayed at the station, while Brown and Tee ran off down the road. Nicholson indicated Tee was driving at the time of the crash, but Brown had previously been driving. (R.165-170).

Law enforcement arrived at the station and questioned Nicholson, Evans, and Spearman about the accident. Nicholson indicated he did not know the people who hit his car. He later indicated he did not tell law enforcement the truth at the gas station. (R.172-174). After being taken to the detention center, Nicholson wrote a letter to Captain Futch indicating he wanted to be honest with them about what happened. (R.174-175). He acknowledged at trial that as a result of him providing information that was confirmed, he got a reduction in his bond from $200,000 to $20,000. (R.188-189).

Evans also testified regarding the armed robbery and kidnapping. Nicholson called Evans about working with Johnson to steal cars and Evans recruited Tee and Brown. (R.205-206). Evans' recitation of the events was similar to that by Nicholson. (R. 207-223). Evans, just like Nicholson, indicated Brown was the driver of Spearman's stolen vehicle at one point, confirming Spearman's identification. (R.224). Evans further testified regarding Spearman's vehicle hitting Nicholson's car at the gas station and then Evans and Nicholson trying to pretend like Spearman hit their car until Evans realized Spearman had the bite mark on his hand. (R.229-230).

At trial, Brown was identified by Spearman, Evans and Nicholson as one of the people involved in the armed robbery and kidnapping. He was identified by all three as the driver at least at some point of Spearman's stolen vehicle.

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. Additionally, any failure to turn over the information was not sufficient to warrant a new trial because other testimony from the victim and a second co-defendant connected Brown to the crime.

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, Evans and Nicholson. The only evidence in the record demonstrates a plea offer was extended to one of the co-defendants, Evans, which was turned down. The only other evidence presented showed Evans **hoped** to obtain a favorable sentence and have charges dropped by testifying against Brown, but never indicated an actual deal, agreement, or understanding 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 circuit court's order grants a new trial 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 circuit 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) (emphasis added); 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., Wisehart 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

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

his testimony. Significantly, during the motion hearing, counsel for Brown specifically 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 allowing for lighter charges and sentencing in exchange for his testimony against Brown and Johnson. Instead, he found merely "discussions" had occurred which led 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

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[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'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.

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.

Additionally, Brown cites to State v. Dean, 427 S.C. 92, 828 S.E.2d 243 (Ct. App. 2019), alleging a "similar procedural history" and was a case in which the Court of Appeals affirmed the grant of a new trial. There are marked differences between the facts of Dean and the facts of

the instant case. In Dean, the co-defendant, Gaston, was the sole individual tying Dean to the main crimes he was charged with. As the Court of Appeals explained:

> Gaston was the **only** witness against Dean and primarily connected him to the burglary. While one of the rifles found under the duplex matched the serial number Hart provided, no other forensic evidence was recovered in the investigation. Gaston's testimony was **essential** for the State to charge Dean with first-degree burglary, grand larceny, and malicious injury to property and to *nolle prosequi* the receiving stolen goods charge. **Without Gaston's testimony linking Dean to the burglary, the State would likely have been able to charge Dean merely with receiving stolen goods under section 16-13-180 of the South Carolina Code (2015).**

Dean, 427 S.C. at 104, 828 S.E.2d at 249–50. In addition to being the only witness and providing the primary testimony used to charge Dean with much more significant charges than otherwise believed, there was clear evidence presented of an "understanding" between the co-defendant and the solicitor's office. Id. at 105, 828 S.E.2d at 250 ("However, at Gaston's plea hearing, Assistant Solicitor Sheek stated that the 'understanding' with Gaston was that the Solicitor's office would convey his cooperation to the court if he cooperated in the trials and other than this agreement to convey cooperation, no other deals existed.").

In the instant case, Evans was not the sole witness tying Brown to the armed robbery and kidnapping. Specifically, the victim identified Brown as the driver and another co-defendant, Nicholson, specifically testified Brown was involved in the crimes. Additionally, as discussed above there is absolutely no evidence, whether in Evans' plea hearing or in the motion hearing for the new trial, that Evans had any "understanding" with the solicitor that his testimony would result in a lesser charge or sentence. Instead, the only evidence presented indicated he had a "belief" that his charge or sentence may be reduced.

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 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. As stated above, Evans' testimony was not the sole testimony linking Brown to the crimes. Testimony by both the victim and another co-defendant, Nicholson, 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. As this Court recently articulated: "[A] violation is material when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different. In other words, the government's evidentiary suppression is so serious as to undermine confidence in the trial's outcome." State v. Durant, 430 S.C. 98, 107, 844 S.E.2d 49, 53 (2020). The failure to disclose Evans' rejected plea and his belief he could receive a better deal was not material because it could not have impacted the result of the trial when two other individuals placed Brown at the scene. There is no basis for a finding the suppression, even if it should have been disclosed, was sufficient to undermine the confidence in the trial's outcome. It was error for the circuit court to grant a new trial based on any alleged deal between Evans and the solicitor's office.[3]

[3] To the extent any argument is made related to the remainder of the issues raised by trial counsel in the motion for a new trial, the Court of Appeals properly concluded the Order granting the new trial was not sufficiently specific and should be remanded for more specific findings. In the alternative, the State submits the Court should find none of the issues raised warrant a new trial and this Court should find the new trial was granted in error and modify the Court of Appeals opinion to the extent it requires remand. For a discussion of the issues on the merits, the State craves reference to Issue II of its Final Brief of Appellant.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed.

Respectfully submitted,

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