ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Carmen T. Mullen, Circuit Court Judge

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OCT - 3 2013
S.C. Supreme Court

TAVARUS LEE ROGERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000214

PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not objecting to comments the solicitor made in his closing argument that were a "Golden Rule Argument" and violated Petitioner's right to a fair trial?

STATEMENT

In February 1999, the Beaufort County Grand Jury indicted Tavarus Lee Rogers on armed robbery (AR), two counts of murder, five counts of kidnapping, and burglary first degree. App.2461 – 2474. On October 16, 2001, Rogers proceeded to trial before the Honorable Jackson V. Gregory and a jury. Rogers was represented by Cory Fleming and Timothy C. Kulp. The state was represented by Randolph Murdaugh, III. The state sought the death penalty. The jury returned a guilty verdict on each count of the indictments. The jury found the existence of statutory aggravating circumstances. However, the jury could not agree on the recommended sentence. App. 2281, ll. 1 – 2283, ll. 11. Judge Gregory sentenced Rogers to life imprisonment on each of the murder charges; life imprisonment on the burglary first degree; thirty years on three kidnapping charges to run consecutively as the judge did not give a sentence on the kidnappings of the two murder victims; twenty-five years on the armed robbery to run concurrently. App. 2297, ll. 17 – 2298, ll. 16.

Rogers filed a notice of appeal which was perfected by the filing of a brief by the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Rogers' convictions and sentences on July 7, 2004. State v. Rogers, Op. No. 2004-UP-427 (Ct. App. filed July 7, 2004).

On April 28, 2006, Rogers filed an application for post-conviction relief (PCR). The state filed a return on August 10, 2006. An evidentiary hearing was held on September 5, 2012 before the Honorable Carmen T. Mullen. Rogers was represented by Michael W. Mogil and Richard H. Bateman. The state was represented by Ashleigh R. Wilson. On December 31, 2012, Judge Mullen issued an order denying Rogers' PCR application and dismissing it with prejudice. App.2449 – 2460. Rogers filed an appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not objecting to comments the solicitor made in his closing argument that were a "Golden Rule Argument" and violated Petitioner's right to a fair trial.

Around midnight on January 2, 1999, several people were at the home of Paul Reischl in Beaufort partying. Petitioner Rogers and his friend, West McKinnon, were among the guests which included two women and eight men. Jocelyn Wendel, one of the women there, testified that cocaine and marijuana were being used during the party. App. 1716, ll. 1 – App. 1717, ll. 24; App. 1729, ll. 17 – App. 1730, ll. 8. She was also introduced to Rogers who called himself "V". App. 1735, ll. 1 – App. 1736, ll. 24.

Rogers and McKinnon and two other men left. About an hour and half later, two men wearing masks returned with guns and burst into the home. Ms. Wendel recognized them as Rogers and McKinnon although the men had their faces covered as Rogers' mask fell down and she saw him. She also recognized McKinnon's jacket. However, she could not identify Rogers in a photo line-up. One man held them at gunpoint while the other man known as "V" took Paul to the bedroom demanding that Paul "give him the stuff". The man holding them yelled: "Don't do it, V". Then they hear a gunshot. "V" returned to the living room and shot Mitchell Riley. The men then left. App. 1722, ll. 1 – App. 1724, ll. 8; App.1725, ll. 4 – App. 1739, ll. 19.

Wendel and the other woman ran to a nearby house and called 911. App. 1767, ll. 1 – 25. Rogers was arrested on a coroner's warrant on January 6, 1999. He gave a confession which was suppressed due to the illegal arrest. App. 8, ll. 23 – App. 9, ll. 25; App. 2498 – App. 2500.

In his closing argument, the solicitor said to the jury:

> Now, kidnapping is the seizing or confining of a person. He will charge you what all is in big 'ole, all kinds of things, but only those two words in the

> definition have any import. "seize" or "confine." If, Madam Juror, Mr. Juror, any one of you ladies and gentlemen, if I were to take a gun and if I were to make you lie down on the floor, and take away from you your freedom to move, I have kidnapped you. It doesn't have to be taking somebody away and trying to get a ransom from the. It only means you have to seize them or confine them for kidnapping.

App. 1988, ll. 25 – App. 1989, ll. 10.

There was no objection from defense counsel. App. 1989, ll. 11 – 25.

Again, the solicitor used the word "you" referring to the jury:

> I prosecute people for dope every day. I don't appreciate it and I don't like it, and they ought to be admonished for doing that, but the mere fact that you have dope does not give a person the right to take your life. It doesn't give them the right to come and steal from you your money just because you sell dope; ad that's what Paul Reischl's brother said, Toby.

App. 1991, ll. 11 – 18.

Later in his argument, the solicitor said to the jury:

> I know if I was in prison, for whatever I was in jail for, I wouldn't be talking to the fella that was accused with me, saying 'we've got to get our stories straight, the public defender says our stories are all messed up.' Nor would you, nor would anybody that wasn't guilty of the crime for which they have been accused.

App. 1996, ll.16 – 22.

There was no objection from defense counsel. App. 1996, ll. 1 – App. 1997, ll. 1 – 24.

At his PCR hearing, Rogers testified that his trial counsel was ineffective because he did not object to the "Golden Rule" argument that the solicitor made in his closing argument. Rogers then cited the comments the solicitor made to the jury regarding imagining themselves as the victim of a kidnapping . App. 2357, ll. 21 – 25; App. 2361, ll. 1 – 25; App. 2364, ll. 24 – App. 2365, ll. 25.

Rogers believed these comments kept the jurors from "deciding the case neutrally." These comments inflamed the passions and prejudices of the jury, and prevented them from being able to

be fair to him. App. 2362, ll. 1 – 24. Rogers then cited several other comments the solicitor made that he believed were "Golden Rule" arguments. App. 2363, ll. 1 – App. 2368, ll. 22.

Trial counsel testified and admitted that he did not object to the solicitor's comments that Rogers said were a "Golden Rule" argument. Trial counsel said he would have objected if he thought the comments were a violation . Counsel did think that some of the solicitor's were close to the line , but he did not think they were harmful. Trial counsel explained that the solicitor's use of the word "you" was "saying you as a sort of you as a person." He said a person may misinterpret what the solicitor in the transcript. However, he did think there were some specific references to the jury. App. 2410, ll. 1 – 18; App. 2421, ll. 24 – App. 2426, ll. 7.

The PCR judge stated during the hearing that she had looked through the solicitor's closing argument, and she agreed that there were a few things that came close. Her issue was whether the lack of trial counsel's objection resulted in ineffective assistance of counsel and was it prejudicial in that it affected the outcome of the trial. App. 2441, ll. 24 – App. 2442, ll. 15.

The PCR judge ruled that she found Rogers' testimony to not be credible while she found trial counsel's testimony credible. The judge ruled that Rogers failed to meet his burden of proof that trial counsel should have objected to the comments the solicitor made in his closing argument. The judge ruled that the solicitor's closing argument was not objectionable and was not a "Golden Rule" argument. The judge wrote: "This court finds that the trial transcript does not reflect evidence of the solicitor telling the jury to put themselves in the shoes of the victims." App. 2456 – App. 2457.

In State v. McDaniel,320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995), the Court of Appeals held that the prosecutor's use of "you" some 45 times in closing argument, asking the jury to put

themselves in the place of the victim, constituted reversible error. The case was remanded for a new trial.

In State v. Harris, 382 S.C. 107, 674 S.E.2d 532 (Ct. App. 2009), the Court of Appeals defined the "Golden Rule "Argument as one that suggests to jurors they put themselves in the shoes of one of the parties; in criminal arena, such an argument is generally improper because it asks the jurors to place themselves in the victim's place. The "Golden Rule" Argument tends to destroy all sense of impartiality of jurors, and its effect is to arouse passion and prejudice, thereby encouraging jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.

The Supreme Court found trial counsel ineffective in the PCR case of Herman Henry "Bud" Von Dohlen, by counsel failing to object to the solicitor's closing argument at the penalty phase of this capital murder trial, asking jurors to "put yourselves in victim's shoes, size six"; the argument asked jurors to abandon their impartiality and view the evidence and potential sentence from the victim's viewpoint. Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004). [1] While the Court found Von Dohlen did not show he was prejudiced by trial counsel's error, it stated it strongly disapproved of such arguments. Id. at 360 S.C. 613.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

[1] The PCR was reversed on other grounds for a new sentencing hearing.

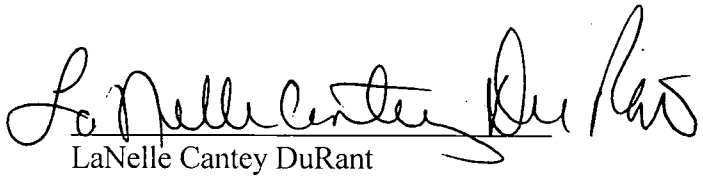
A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

Trial counsel was ineffective in Rogers' case for not objecting to the solicitor's comments asking jurors to place themselves in the place of the murder victim and kidnap victims. The solicitor specifically addressed the jurors by saying:' Madam Juror, Mr. Juror." This removed neutrality from the jurors' deliberations and thus was prejudicial to Rogers.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences reversed, and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of October, 2013.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Tavarus Rogers #244362, Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, at this 3rd day of October, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of October, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.