STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Beaufort County
Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2013-000214

TAVARUS LEE ROGERS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

I. Did the lower court properly find counsel was not ineffective for failing to object to the solicitor's closing argument when the solicitor's statements were not improper "Golden Rule" arguments and the Petitioner failed to carry his burden of proving the solicitor's statements infected his trial with unfairness and violated his due process rights?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. The Petitioner was indicted at the February 1999 term of the Beaufort County Grand Jury for armed robbery (99-GS-07-220), two counts of murder (99-GS-07-221, -222), five counts of kidnapping (99-GS-07-281, -282, -283, -285, -286), and burglary- first degree (99-GS-07-288). The Petitioner was represented by Cory Fleming, Esquire, and Timothy Kulp, Esquire.

The State gave notice that they would be seeking death if the Petitioner was convicted. The Petitioner proceeded to trial and was found guilty by a jury. On October 16, 2001, the Honorable Jackson Gregory sentenced to the Petitioner to confinement twenty-five years for armed robbery, thirty years for three counts of kidnapping, and life imprisonment for burglary and both counts of murder. The kidnapping sentences are to be served consecutively to each other and concurrent to all other charges. Judge Gregory did not impose a sentence for the two kidnapping charges that were related to the deceased victims.

A timely Notice of Appeal was filed on the Petitioner's behalf at the South Carolina Court of Appeals. Robert Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Rogers, Op. No. 2004-UP-427 (S.C. Ct. App. filed July 7, 2004).

The Petitioner filed an application for post-conviction relief on April 28, 2006. The Respondent made its Return on August 10, 2006. An evidentiary hearing was held in the matter on September 5, 2012 at the Beaufort County Courthouse before the Honorable Carmen T. Mullen. The Petitioner was present and represented by Michael w. Mogil, Esquire. The Petitioner's application was denied and dismissed with prejudice by Judge Mullen by order dated

December 31, 2012. The Petitioner appealed this denial and filed a Petition for Writ of Certiorari to this Court. This Return follows.

ARGUMENT

There is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to object during the solicitor's closing argument when the solicitor's statements were not objectionable "Golden Rule" arguments, the Petitioner failed to carry his burden of proving the statements infected his trial with unfairness, and the Petitioner failed to show he was prejudiced by counsel's performance.

The Petitioner asserts the lower court erred by finding counsel was ineffective for failing to object to comments the Solicitor made during his closing statement that were impermissible "Golden Rule" arguments. The Respondent submits there was probative evidence to support the lower court's ruling that counsel was not ineffective and that the alleged improper statements made by the solicitor were not objectionable.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional

norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The Respondent submits trial counsel was not deficient for failing to object during the solicitor's closing argument. The Respondent submits the solicitor's comments during closing argument were not "Golden Rule" arguments and the Petitioner failed to carry his burden of proving the solicitor's comments infected the Petitioner's trial with unfairness and that he was prejudiced. "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609–10, 602 S.E.2d at 744. "A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006).

"Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166

(2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

In this case, the Petitioner asserts the following statement were improper "Golden Rule" arguments.

> "Now, kidnaping 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 gentleman, 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 them. It only means you have to seize them or confine them for kidnaping." (App. 1988:25-1989:10).
>
> "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; and that's what Paul Reischl's brother said, Toby." (App. 1991:11-18).
>
> "I know if I was in prison, for whatever I was in jail for, I wouldn't be talking to the fellas that 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. 1996:16-22).

At the post-conviction relief hearing, counsel testified they did not object to the solicitor's closing argument because they did not believe the solicitor's statements were objectionable at the time. (App. 2422:24-25). Counsel testified had he or his co-counsel thought the testimony was objectionable they would have objected. (App. 2422:5-8). He testified further that the solicitor's use of the word "you" was another way of saying "one might do something" and that when he used the word "you" he was not specifically referring to the jury. (App. 2422:8-20). Counsel explained further that some of the statements referenced by the Petitioner at the evidentiary hearing came close to being objectionable, but that they made a calculated decision not to object because they did not think the statements were harmful. (App. 2425:15-23). Lastly,

counsel testified he did not think any objection to the closing argument would have been sustained by the court. (App. 2425:22-23).

The Respondent submits counsel was not deficient for failing to object to statements made by the solicitor during closing argument because as counsel stated the statements were not objectionable. The first statement alleged by the Petitioner to be objectionable was simply a hypothetical used by the solicitor to explain the elements of kidnapping. (App. 1988:25-1989:10). The solicitor did not ask the victim's to put themselves in the position of the victim's in this case. The solicitor also did not make any specific reference to the victims in the case or to the Petitioner. The lower court noted on the record during the post-conviction relief hearing that this statement was a common hypothetical used by this particular solicitor to explain the elements of kidnapping. (App. 2440:25-2441:5).

The Respondent submits the second statement alleged by the Petitioner also was not a "Golden Rule" argument and did not in any way reference the victims or ask the jury to place themselves in the position of the victim to decide the case from their perspective. In the second statement, the solicitor argued to the jury that the mere fact that a person sells dope does not give another person the right to take that person's life. (App. 1991:11-18). The Respondent submits the solicitor's use of the words "you" and "your" was not in direct reference to the jury.

The Respondent submits the third statement alleged by the Petitioner to be a "Golden Rule" argument also did not in any way reference the victims or ask the jury to place themselves in the position of the victim to decide the case from their perspective. In the solicitor's third statement, the solicitor argues to the jury that an innocent person would not tell his co-defendant who is accusing him of a crime that they needed to get their stories straight. (App. 1996:16-22).

The solicitor's use of the words "you" or "your" in the solicitor's closing alone without any reference to the jury putting themselves in the place of the victims does not constitute a "Golden Rule" argument. The Petitioner cites State v. McDaniel for the prosecutor's use of "you" and forms of the word some 45 times in his closing argument in which he asked the jury to put themselves in the place of the victim. 320 S.C. 33, 462 S.E.2d 882 (1995). In McDaniel, the solicitor's comments were lengthy and referenced the jurors' family members. Id. at 37-38, 462 S.E.2d at 884. The McDaniel court did not indicate from its ruling that the use of the words "you" or "your" alone was sufficient to constitute an objectionable "Golden Rule" argument. The Respondent submits the solicitor's use of the words "you" or "your" in his closing argument did not rise to the level of reference in McDaniel and was not accompanied by statements asking the jurors to put themselves in the place of the victim.

Even if these statements were objectionable, the Petitioner failed to carry his burden of proving that the solicitor's statements infected the Petitioner's trial with unfairness and deprived the Petitioner of a fair trial. The Respondent submits the alleged improper arguments represented a small portion of the solicitor's closing argument and were not extensive enough to arouse the jurors' passions or prejudices. Counsel for the Petitioner also testified at the post-conviction relief hearing that he felt the solicitor's comments were harmless. (App. 2425:15-23).

The Petitioner has failed to show that any objection by counsel to the solicitor's statement would have been anything other than futile as counsel states it would have been. (App. 2425:22-23). Our courts have developed the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused. State v. Covert, 368 S.C. 188, 201, 628 S.E.2d 482, 489 (Ct. App. 2006) aff'd as modified, 382 S.C. 205, 675 S.E.2d 740 (2009). The Respondent submits the Petitioner has

failed to present any evidence that the solicitor's comments inflicted his trial with such unfairness as to render his trial proceeding and the jury's verdict a violation of his due process rights. The Respondent submits the Petitioner failed to carry his burden of proving that counsel was deficient for failing to object and that as a result of counsel's performance he was prejudiced.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Feb 20, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge

TAVARUS LEE ROBERS Petitioner,

v.

STATE OF SOUTH CAROLINA Respondent,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Returns to Petition for Writ of Certiorari has been served upon opposing counsel, Lanelle C. Durant, this 20th day of February.

Anne R. Henley
Legal Assistant

SWORN to before me this
20th day of February, 2014.

_____(L.S.)
Notary Public for South Carolina.
My Commission Expires: 10/28/2014

ALAN WILSON
ATTORNEY GENERAL

February 20, 2014

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Tavarus Lee Rogers v. State of South Carolina
Appellate Case No. 2013-000214

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Respondent's Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this return today.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Lanelle C. Durant, Esquire