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February 12, 2016

RECEIVED

FEB 17 2016

S.C. SUPREME COURT

The Honorable Daniel E. Shearhouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Treveen Gethers v. State of South Carolina; Case No.: 2014-CP-18-1287

Dear Mr. Shearhouse:

Enclosed for filing is the Notice of Appeal (original and clocked copy) in the above Post Conviction Relief (PCR) case. Also enclosed are the following:

- (1) Proof of service of the Notice of Appeal on the respondent;
- (2) The Order of Dismissal &
- (3) A Request for Representation on Appeal.

The Applicant-Appellant was represented by me as an indigent pursuant to my contract with the South Carolina Commission on Indigent Defense (SCCID) to handle PCR cases. By copy of this letter, I am forwarding a duplicate set of documents to the SCCID.

The Request for Representation on Appeal and the Affidavit in Support thereof are signed by me as attorney for Applicant-Appellant. If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,

Rodney D. Davis
South Carolina Bar #: 12396
4000 Faber Place Drive, Suite 300
Charleston, SC 29405
(843) 323-4353
Davis@LowcountryLawOffice.com

Enclosures. As stated above.

cc: J. Clayton Mitchell, Assistant Attorney General
Kimberly McCall, Appellate Division, SCCID

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED COPY
2016 FEB -4 AM 11:35

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Cheryl Kalam
CLERK OF COURT
DORCHESTER COUNTY

Frank R. Addy, Jr., Circuit Court Judge

Case No.: 2014-CP-18-1287

RECEIVED

FEB 17 2016

S.C. SUPREME COURT

Trevee Gethers,

Appellant,

v.

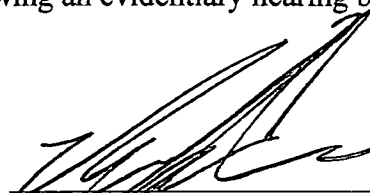
State of South Carolina,

Respondent.

NOTICE OF APPEAL

Trevee Gethers appeals the denial of his Post Conviction Relief application in this case. The Application for relief was denied, following an evidentiary hearing before the Honorable Frank R. Addy, Jr., on October 29, 2015.

February 1, 2016


Rodney D. Davis
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(843) 323-4353
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Attorney for Appellant

Other Counsel of Record:
J. Clayton Mitchell
Assistant Attorney General
Office of the Attorney General, State of South Carolina
PO Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED COPY
2016 FEB -4 AM 11:35

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Christy Graham
CLERK OF COURT
DORCHESTER COUNTY

Frank R. Addy, Jr., Circuit Court Judge

Case No.: 2014-CP-18-1287

Treveen Gethers,

Appellant,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by mailing a copy, via US Mail, to the address of record, J. Clayton Mitchell, P.O. Box 11549, Columbia, South Carolina 29211-1549, on February 2, 2016.

February 2, 2016

Michelle Moore Trimble

Michelle Moore Trimble
Paralegal to Rodney D. Davis
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(843) 323-4353
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Attorney for Appellant

Other Counsel of Record:
J. Clayton Mitchell, Assistant Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

Treveen Gethers, #343706,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2014-CP-18-01287

ORDER OF DISMISSAL

OFFICE OF CLERK OF COURT
DORCHESTER COUNTY

2016 JAN 15 PM 4:09

FILED-RECORDED

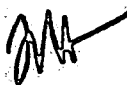
This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 3, 2014. Respondent filed a Return on February 26, 2015, requesting an evidentiary hearing be convened. Rodney D. Davis was appointed by the Dorchester Clerk of Court. An evidentiary hearing was held on October 28, 2015, at the Dorchester County Courthouse. Applicant was represented by Mr. Davis. Respondent was represented by J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office.

At the PCR hearing, Applicant testified on his own behalf. Also testifying were Applicant's trial counsel Sara Jayne McClellan¹, Esquire. This Court had before it the Dorchester County Clerk of Court records, Applicant's South Carolina Department of Corrections records, appellate records, the PCR application, the Return, the appellate records, and the transcript.

I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Dorchester County Clerk of Court's orders of commitment. The Dorchester County Grand Jury indicted the Applicant at the December 2007 term of General Sessions for Murder (2007-GS-18-1755). Ms. McClellan represented Applicant. The State called Applicant's case for trial

¹ Formerly Ms. Sara Jayne Rogers.



before the Honorable Diane S. Goodstein where he was found guilty. On November 19, 2010, Judge Goodstein sentenced Applicant to forty-five (45) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Elizabeth A. Franklin-Best, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed Applicant's conviction and sentence on October 24, 2010. State v. Gethers, Op. No. 20120-UP-576 (S.C. Ct. App. filed October 24, 2012). Applicant's writ of certiorari to the South Carolina Supreme court was denied on May 7, 2014. Remittitur was sent on May 15, 2014.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

- I. Ineffective assistance of trial counsel in:
 - a. Failing to object to Judge Goodstein's opening instruction;
 - b. Failing to object the solicitor's comments regarding robbery as a motive despite the fact that Applicant was not indicted for robbery;
 - c. Failing to object to the admission of Applicant's booking photo; and
 - d. Failing to request a voluntary manslaughter charge.

II. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the 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, 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, 2064, 80 L.Ed.2d 674, 692 (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. 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. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Counsel's testimony to be credible. These credibility findings have been applied to the Court's findings and conclusions set forth below.



Ineffective Assistance of Trial Counsel

Failure to Object to Judge Goodstein's Comments

First, Applicant alleges Counsel was ineffective in failing to object to Judge Goodstein's opening comments to the jury. He alleges that the comments were inappropriate and prejudicial. When speaking to the jury before the trial began, Judge Goodstein explained the trial's procedure and cautioned jurors to temper any expectations:

It is a – and it may be the – fundamental part of democracy, a search for the truth in an effort to make sure that justice is done between the State and Mr. Gethers. Searching for the truth and making sure that justice is done is often slow, deliberative, and repetitive, the opposite no doubt of what you may have seen on television, read about in books, or perhaps in movies.

(Trial Tr. p. 122, lines 11-18). Applicant argues the "search for the truth" portion is inappropriate and that an objection should have been made.

This Court finds Counsel's failure to object was not erroneous. Counsel credibly testified that she did not find the statements objectionable. These remarks are part of the standard opening instructions for many judges, and Judge Goodstein's opening remarks are not an instruction on the law. Additionally, because Judge Goodstein properly instructed the jury on the burden and standard of proof at the close of the case, any error was clearly harmless and did not affect the result.

Solicitor's Comments Regarding Robbery

Applicant alleges Counsel was ineffective for failing to object to the solicitor discussing robbery as a motive for the murder when Applicant was not indicted for robbery. During opening statements the solicitor stated:

Ladies and gentleman of the jury, September 17, 2007, the victim in that case, Mr. Robert Earl Robinson, lost his life to that man sitting right over there at the defense table in his attempt to rob Mr. Robinson of a few dollars. And what did he get from it? Not one red cent.

(Trial Tr. p. 131, line 12-18). Applicant argues that since he was not charged with robbery that the State could not claim that he robbed the victim.

This Court finds Applicant has failed to meet his burden in proving Counsel was ineffective. Robbery was part of the *res gestae* of the crime, and the solicitor was permitted to argue the State's theory of the case. See State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) ("The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged, or may be needed to aid the fact finder in understanding the context in which the crime occurred."). These comments would also be admissible under Rule 404(b) of the South Carolina Rules of Evidence which allows prior bad act evidence to be presented to the jury if offered to show motive. Accordingly, trial counsel was not ineffective for failing to object. Applicant has failed to present any credible evidence to show how the result of the trial would have been different if an objection had been made. This allegation is denied and dismissed.

Applicant's Booking Photo

Applicant also alleges Counsel was ineffective for failing to object Applicant's booking photo being offered as evidence. A booking photo of Applicant was admitted during the testimony of Javon Wright, a Charleston County Detention Center employee. (Trial Tr. p. 324, line 15 = p. 325, line 16).

This Court finds the booking photo was offered in a relevant line of questioning. See (Trial Tr. p. 323-26). Testimony was elicited concerning prints lifted from the automobile where the victim was found murdered. Applicant was identified based upon an earlier set of case prints (State's Exhibit 40) taken from that earlier arrest. The booking photo tied those prints to Applicant. Counsel testified credibly to this effect and agreed that the photo was admitted to

show how law enforcement identified Applicant as a suspect in the murder. Accordingly, the photo was introduced for identification purposes. Applicant has failed to prove Counsel was ineffective in failing to object. Applicant has also failed to prove that if an objection had been made, that it would have been successful and would have changed the result of the trial. This allegation is denied and dismissed.

Jury Charges

Finally, Applicant alleges Counsel was ineffective in failing to request a voluntary manslaughter charge and for failing to object to the inference of malice from the use of a deadly weapon instruction.

This Court finds no evidence existed to warrant a voluntary manslaughter charge. A judge is only required to charge a jury on a lesser-included offense if evidence exists that suggests that the lesser, rather than the greater, crime was committed. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 242 (1996). There must be evidence that the defendant committed the lesser-included offense to entitle him to a jury charge on the offense. State v. Mathis, 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986). No evidence existed to show a sufficient legal provocation or a sudden heat of passion. See State v. Locklair, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation."). Therefore, Counsel was not ineffective for failing to request such an instruction.

This Court also finds Applicant failed to meet his burden in proving Counsel was ineffective in failing to object to the jury instruction regarding the inference of malice from the use of a deadly weapon. Belcher held that the "use of a deadly weapon" implied malice instruction was no longer proper where evidence is presented that "would reduce, mitigate,



excuse or justify the killing (or the alleged assault and battery with intent to kill)." State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009). This Court finds this instruction was a correct statement of law in light of the absence of evidence tending to reduce the homicide from a murder to a lesser degree of manslaughter. Counsel's testimony that she did not request the lesser included charge because no evidence was presented to support it and because it was inconsistent with their defense of mere presence is both credible and persuasive. Accordingly, Counsel was not ineffective for not requesting a voluntary instruction or for not objecting to the inference of malice instruction.

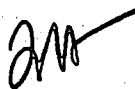
As a final matter, Counsel Davis notes that Counsel was disbarred in July 2015. The Court has reviewed the order of our Supreme Court, and the Court finds nothing in the order indicating a pattern of inadequate representation of clients at trial. Accordingly, the Court finds that Applicant has failed to demonstrate any causal link between Counsel's professional disciplinary history and the alleged deficiencies of representations at trial. Accordingly, the Court finds Applicant has failed to meet his burden of demonstrating Counsel's representation fell below professional norms. Applicant has also failed to prove any resulting prejudice that would entitle him to relief.

All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application.



Applicant failed to demonstrate counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 8th day of January, 2016.


FRANK R. ADDY, JR.
Presiding Judge

Greenwood, South Carolina

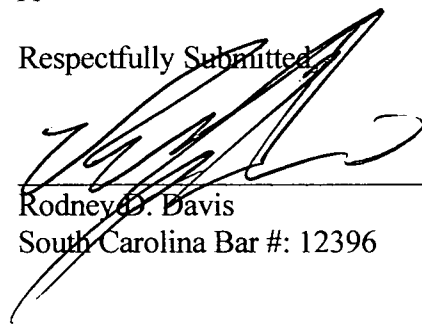
STATE OF SOUTH CAROLINA)	IN THE SUPREME COURT OF SOUTH CAROLINA
)	
COUNTY OF DORCHESTER)	
)	Case No.: 2014-CP-18-1287
)	
TREVEE GETHERS,)	
Applicant.)	
-versus-)	REQUEST FOR REPRESENTATION ON APPEAL
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	

On behalf of the request of the above-named Applicant, to be represented by the South Carolina Commission of Indigent Defense, Appellate Division (SCCID), the undersigned attorney would show unto this Honorable Court that:

1. He is the attorney for the Applicant-Appellant in the above captioned case. The Applicant-Appellant was in custody during and taken into custody immediately following the Post Conviction Relief (PCR) hearing and was not available to personally sign this request;
2. The Applicant-Appellant was represented by the undersigned attorney as an indigent, pursuant to a contract with the SCCID;
3. The Applicant-Appellant has been informed that he may request assistance from the SCCID Appellate Division in perfecting his appeal;
4. A timely Notice of Intent to Appeal has been filed on the Applicant-Appellant's behalf;
5. The Applicant-Appellant has been informed that nothing requires SCCID Appellate Division to pursue this appeal unless that office's Chief Attorney is satisfied that there is arguable merit to this appeal and that he cannot afford to hire an attorney.

At this time, the Applicant-Appellant requests the aid of the SCCID Appellate Division in perfecting his appeal to the South Carolina Court of Appeals.

Respectfully Submitted,



Rodney D. Davis
 South Carolina Bar #: 12396

Charleston, South Carolina
 February 1 , 2016

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February 1, 2016

J. Clayton Mitchell, Assistant Attorney General
Office of the Attorney General, State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549

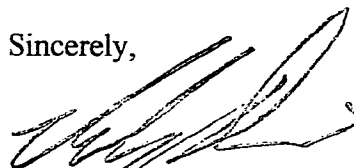
RE: Treveen Gethers v. State of South Carolina, Case No: 2014-CP-18-1287

Dear Mr. Mitchell:

Enclosed is a duplicate set of Appeal documents that I have forwarded to the Clerk of the Supreme Court of South Carolina concerning the above-listed Post Conviction Relief (PCR) case.

If you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,



Rodney D. Davis
South Carolina Bar #: 12396
4000 Faber Place Drive, Suite 300
Charleston, SC 29405
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Enclosure. As stated above.
RDD/mmt



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E-Mail: Davis@LowcountryLawOffice.com

February 12, 2016

Kimberly McCall
South Carolina Commission on Indigent Defense
P.O. Box 11433
Columbia, SC 29211-1433

RE: Treveen Gethers v. State of South Carolina; Case No.: 2014-CP-18-1287

Dear Ms. McCall:

Enclosed is a duplicate set of Appeal documents that I have forwarded to the Clerk of the Supreme Court of South Carolina concerning the above-listed Post Conviction Relief (PCR) case. I was appointed to this PCR pursuant to a contract that I have with your office. I have requested that your office assume the appeal of this case.

Should you need anything further, do not hesitate to contact me. Thank you for your time and attention to this matter.

Sincerely,



Rodney D. Davis
South Carolina Bar #: 12396
4000 Faber Place Drive, Suite 300
Charleston, SC 29405
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Enclosures. As stated above.
RDD/mmt

cc: J. Clayton Mitchell, Assistant Attorney General
Kimberly McCall, Appellate Division, SCCID