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May 3, 2016

RECEIVED

MAY 09 2016

The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

S.C. SUPREME COURT

Re: *Gathers v. State of South Carolina*
Case No.: 2014-CP-10-2046

Dear Mr. Shearouse:

Enclosed for filing, please find an original and two copies of Appellant's Notice of Appeal of the denial of his application for Post-Conviction Relief. If you find everything in order, please file the original and return the clocked in copies in the enclosed self-addressed envelope.

Please note I was appointed and copy the Office of Appellate Defense who will handle the appeal. Please call if you have any questions.

With kindest regards, I am

Sincerely,



Christopher L. Murphy

CLM:jh
Enclosures

cc (e/ encls.): Mr. Gregory Gathers
Robert M. Dudek, Esq.
PO Box 11433
Columbia, SC 29211-1433
The Honorable Deadre L. Jefferson
The Honorable Julie J. Armstrong
Rutledge Johnson, Asst. AG

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case Nos.: 2014-CP-10-2046

RECEIVED

MAY 09 2016

S.C. SUPREME COURT

Gregory Quinn Gathers Appellant


v.

State of South Carolina Respondent

NOTICE OF APPEAL

Appellant appeals the Court's denial of his application for Post-Conviction Relief. Attached is the order from the Court dated April 26, 2016 and received May 2, 2016.

May 3, 2016


CHRISTOPHER L. MURPHY
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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MAY 09 2016

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Deadre L. Jefferson, Circuit Court Judge

Case Nos.: 2014-CP-10-2046

Gregory Quinn Gathers. Appellant

v.

State of South Carolina Respondent

PROOF OF SERVICE

I CERTIFY that I have served APPELLANT'S NOTICE OF APPEAL by delivering a copy via U.S. Mail First-Class postage prepaid on the 3rd day of May, 2016, on the following:

Rutledge Johnson, Esquire
Assistant Attorney General
South Carolina Office of the Attorney General
1000 Assembly Street
Columbia, SC 29201

The Honorable Deadre L. Jefferson
Circuit Court Judge, Ninth Judicial Circuit
Charleston County Judicial Center
100 Broad Street, Suite 336
Charleston, SC 29401

The Honorable Julie J. Armstrong
Clerk of Court, Ninth Judicial Circuit
100 Broad Street, Suite 106
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Robert M. Dudek, Esquire
Office of Appellate Defense
Post Office Box 11433
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Gregory Quinn Gathers (SCDC #00161538)
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669



STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Gregory Quinn Gathers #161583,³⁸)

2014-CP-10-2046

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

BY _____

2016 APR 26 PM 3:55
JULIE J ARMSTRONG
CLERK OF COURT

FILED

Presiding Judge:
Applicant's Attorney:
Respondent's Attorney:
Trial Counsel:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
Christopher Murphy, Esquire
J. Rutledge Johnson, Esquire
Martha Kent Runey
December 14, 2015
Denise Lauder

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed March 27, 2014. The Respondent made its Return on March 4, 2015 and filed on March 9, 2015. An evidentiary hearing into the matter was convened on December 14, 2015, at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Christopher Murphy, Esquire, and J. Rutledge Johnson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

At the hearing, Martha Kent Runey, Esquire testified. This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, the Applicant's PCR Application, the State's Return, the trial transcript and the appellate records.

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[Signature]

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the September 2010 term of the Charleston County Grand Jury for murder¹ (2010-GS-10-6287). The Applicant was represented by Martha Runey, Esquire.

On November 14-17, 2011, the Applicant proceeded to trial and was found guilty as indicted. The Applicant was sentenced by the Honorable J.C. Nicholson to confinement for a period of life without parole.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Benjamin Tripp, Esquire, of the Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Gathers, No. 13-UP-462 (S.C. Ct. App. December 18, 2013). The Remittitur was issued on January 3, 2014.

ALLEGATIONS

In his original Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. Counsel failed to obtain an expert for Applicant's defense.
 - b. Counsel failed to object to the State's "golden rule" arguments.

Applicant amended his Application and argued at the hearing that he is being held in custody unlawfully for the following reasons:

¹ Murder is a violent, most serious felony punishable by death, imprisonment for life, or by a mandatory minimum term of imprisonment for thirty (30) years. See S.C. CODE ANN. §§ 16-3-10, -20 (2003), 16-1-60 (2003), 17-25-45 (2003).

1. Failure to request a charge of involuntary manslaughter.
2. Failure to preserve a Self-Defense jury instruction.
3. Failure to object to an improper jury instruction.
4. Failure to object to a "Golden Rule" argument.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court had the opportunity to observe the witnesses on the witness stand and hear their testimony. The Court has also read the trial transcript and the appellate records, all of which assists the Court in judging their credibility. The Court finds the testimony of trial counsel credible.

Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCPP). 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, 2064, 80 L.Ed.2d 674, 692 (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. See Strickland at 690, 104 S. Ct. at 2066. The courts presume that counsel rendered adequate assistance and made all significant decisions in the

Life imprisonment means until death of the offender without the possibility of parole. See S.C. CODE ANN. §§ 16-3-20 (2003).

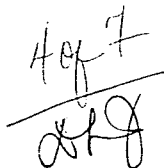
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[Signature]

exercise of reasonable professional judgment. See Id. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 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.

Failure to Request a Charge of Involuntary Manslaughter

Applicant first argues that Counsel was ineffective for failing to request a jury instruction of involuntary manslaughter. This Court finds this allegation without merit. "Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in (1) an unlawful activity not naturally tending to cause death or great bodily harm or (2) a lawful activity with reckless disregard for the safety of others." State v. Scott, 408 S.C. 21, 24, 757 S.E.2d 533, 535 (Ct. App. 2014), reh'g denied (May 2, 2014), cert. granted (Sept. 11, 2014), aff'd, 779 S.E.2d 529 (S.C. 2015), reh'g denied (Dec. 16, 2015). This Court has reviewed the entire trial transcript and finds no evidence whatsoever that Applicant was either engaged in unlawful activity not naturally tending to cause death or great bodily harm, as Applicant admitted he physically and brutally assaulted victim causing her death; or that he was engaged in a lawful activity with reckless disregard for the safety of others, as he was engaged in a physical altercation, an unlawful activity. Therefore, this Court finds no

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deficiency of Counsel for not asking for an involuntary manslaughter jury charge. Moreover, Applicant can prove no resulting prejudice under Strickland. Thus, this allegation is denied.

Failure to preserve a self-defense jury instruction

Applicant also alleges that Counsel was deficient in not preserving a self-defense jury instruction. This Court finds this allegation without merit. This Court has reviewed the entire transcript and finds that Counsel sufficiently preserved a self-defense request for appellate review. See Tr. 532: 10-25; 533-540, 541: 1-14 (“the request for the charge of self-defense is denied.”). As there is clear evidence in the record that Counsel preserved this issue for appellate review, this allegation is also denied.

Failure to object to the malice jury instruction

Additionally, Applicant alleges Counsel was ineffective for failing to object to the jury instruction that malice can be inferred from the use of a deadly weapon. This Court finds this malice instruction proper in light of the testimony presented during the trial. Applicant claims that State v. Belcher, 385 S.C. 597 (2009), precludes the trial judge from charging the inference of malice from the use of a deadly weapon when a lesser included offense jury instruction was charged. This Court disagrees with this assertion and finds this malice charge was proper under the circumstances. The evidence presented in the Belcher case was based upon self-defense. See Belcher at 601 (“Because the evidence presented a jury question of self-defense, Belcher asserts it was error to charge the jury that it may infer malice from the use of deadly weapon. We agree.”) In the case at bar, there was no claim of self-defense, as Applicant brought on the confrontation and was the aggressor in the assault which ultimately resulted in murder. No evidence of self-defense was presented, unlike the Belcher

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case. Therefore, Applicant's case is distinguishable from Belcher and this Court finds the malice instruction proper. Thus, Counsel was not ineffective for not objecting to this jury charge. Accordingly, this allegation is denied.

"Golden Rule" Argument

Further, Applicant alleged that counsel was ineffective for failing to object to an improper closing argument by the solicitor. This Court finds this allegation without merit. The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Furthermore, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. To be entitled to a new trial for improper closing arguments, the test is whether "the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001). A Golden Rule argument is one in which the State asks the jurors to put themselves in the shoes of the victim. See Von Dohlen v. State, 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004) ("put yourself in Margaret's shoes, size six").

In this case, Applicant alleges that the Solicitor asked the jurors to put themselves in the victim's position, thus inflaming their personal biases. However, this Court has reviewed the Solicitor's entire closing argument and can find no such rhetoric. The Solicitor's closing argument was confined to the evidence in the record and the reasonable inferences therefrom. Therefore, this Court finds Counsel was not ineffective for not objecting to solicitor's closing argument. Thus, this allegation is denied.

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CONCLUSION


Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!



Deadra L. Jefferson
Presiding Circuit Court Judge
Ninth Judicial Circuit

April 16, 2016
Charleston, South Carolina



Christopher L. Murphy
PO Box 2008
Mt. Pleasant, SC 29465

The Honorable Daniel E. Shearouse
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