

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEAL

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SC Court of Appeals

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S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY  
COURT OF COMMON PLEA

CARMEN T. MULLEN CIRCUIT JUDGE

CASE NO. 2006-CP-07-01894

The State

Respondent

TAVARUS LEE ROBERTS

Appellant

NOTICE OF APPEAL

Tavarus Lee Roberts gives notice of his intent to appeal the order of the Honorable Carmen T. Mullen dated December 31, 2012 which affirm his conviction in General Session Court. Appellant received written notice of the order January 17, 2013. Attached

*Tavarus Lee Roberts* SR

TAVARUS LEE ROBERTS

HEBER CORRECTIONAL INST.

P.O. BOX 265

RIDGEVILLE, S.C. 29472



THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEAL

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JAN 31 2013

SC Court of Appeals

APPEAL FOR BEaufort COUNTY  
COURT OF COMMON PLEA

CAROLYN T. MILLER CALVERT/GRACE

CASE NO. 2006-CP-07-01694

The State

Respondent

TAVARUS LEE ROBERTS

Appellant

CERTIFICATION OF SERVICE

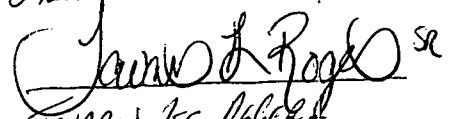
The undersigned hereby certify that a notice of appeal has been served this 29<sup>th</sup> day of January 2013 by depositing the same by U.S. mail first class delivery to:

Alan Wilder

Attorney General

P.O. Box 11549

Columbia, S.C. 29211

  
TAVARUS LEE ROBERTS

THE STATE of SOUTH CAROLINA  
IN THE COURT of APPEAL

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JAN 31 2013

SC Court of Appeals

APPEAL from BEAUFORT COUNTY  
COURT of COMMONS PLEA

CARMEL T. MULLEN Circuit Judge

CASE NO. 2006-CP-07-01094

The state

Respondent

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TAVARUS LEE ROGERS

Appellant

CERTIFICATION of SERVICE

The undersigned hereby certify that a notice of appeal has been filed this  
29<sup>th</sup> day of January 2013 by depositing the same by U.S. Mail first class  
delivered to:

Clerk of Court

1615 Sumter St. Box 11629

Columbia, S.C. 29211

Tavarus Lee Rogers SR  
TAVARUS LEE ROGERS 244362

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BEAUFORT )  
 )  
 Tavarus Lee Rogers, Sr. #244362 )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS

2006-CP-07-1094

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 COURT

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 28, 2006. The Respondent made its return on August 10, 2006. An evidentiary hearing on the matter was held on September 5, 2012 at the Beaufort County Courthouse before the Honorable Carmen T. Mullen. The Applicant was present at the hearing and represented by Michael W. Mogil, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified at the evidentiary hearing, along with Cory Fleming, Esquire, and Timothy Kulp, Esquire. The Court had before it the trial transcript, the Beaufort County Clerk of Court records, and the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's return, and the Applicant's appellate records.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. The Applicant was indicted at the February 1999 term of the Beaufort County Grand Jury for armed robbery (99-GS-07-0220), two counts of murder (99-GS-07-0221,-0222), five counts of kidnapping (99-GS-

07-0281, -0282, -0283, -0285, -0286), and burglary 1<sup>st</sup> degree (99-GS-07-0288). He was represented by Cory Fleming, Esquire and Timothy Kulp, Esquire.

At trial, the Applicant was found guilty. On October 16, 2001, the Applicant was sentenced by the Honorable Jackson V. Gregory to confinement for a period of twenty-five (25) years for armed robbery, thirty (30) years for three (3) counts of kidnapping<sup>1</sup>, and life imprisonment for burglary 1<sup>st</sup> degree and both counts of murder. The kidnapping sentences are to be served consecutively to each other and concurrent to all other charges. The burglary 1<sup>st</sup> degree sentence is also to be served consecutively. All other charges are concurrent.

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

### ALLEGATIONS

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

1. Ineffective Assistance of Counsel
2. Due Process Violation

The Applicant amended his application on August 31, 2011 and supplemented the initial application with the following allegations:

1. Ineffective assistance of counsel at trial
  - a. Failure by counsel to permit Plaintiff to testify in his own defense.
  - b. Failure by counsel to examine key alibi witness, Shamira Holmes, and failure to call Ms. Holmes as a defense witness.
  - c. Failure to require a live line-up prior to trial.

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<sup>1</sup> Judge Gregory did not impose a sentence for two of the kidnapping charges that were related to the deceased victims.

At the hearing, Applicant proceeded solely on the allegations of ineffective assistance of counsel.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

#### **Ineffective Assistance of Counsel**

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For the Applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

At the beginning of the Applicant's evidentiary hearing, the Applicant's counsel requested a continuance in order to subpoena an alibi witness who had recently been located. The State opposed the continuance and argued that the State was ready to proceed. The Court denied the Applicant's motion for continuance as the case had been continued twice before and proceeded with the evidentiary hearing.

At the evidentiary hearing, the Applicant testified that he met with trial counsel, Cory Fleming and Timothy Kulp, frequently prior to trial. He testified that he reviewed discovery and discussed possible defenses with trial counsel prior to trial. The Applicant testified that he knowingly and intelligently rejected a plea offer of thirty (30) years to be served concurrently and that it was his decision to proceed to trial. The Applicant testified that the Solicitor, Randolph Murdaugh's closing statement violated his rights. He testified that Solicitor Murdaugh used the words "you" and "your" approximately thirty-five (35) times during the State's closing argument. The Applicant testified that all of the references to "you" or "your" were prejudicial and that trial counsel should have objected. The Applicant testified further that the "Golden Rule" was violated and the prosecutor incited the passions of the jury and appealed to the morality of the jury. He also testified that an example given by Solicitor Murdaugh was too similar to the facts of his case.

The Applicant testified that trial counsel argued extensively during his Neil v. Biggers<sup>2</sup> hearing. He testified that trial counsel argued the wrong statement and should have argued prior inconsistent statement because the victim switched her testimony during the in-court identification. He testified that trial counsel should have objected to the photo line-up as a suggestive out of court procedure. The Applicant also testified that he recalls trial counsel cross-examining the victim about her inability to identify the perpetrator's clothing and about her

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<sup>2</sup> 409 S.C. 188, 93 S.Ct. 355 (1972).

viewing the Applicant's picture in the newspaper prior to her identification. He testified that he also recalled trial counsel's cross-examination of the victim about the statement she gave to the police and her inability to identify anyone as the perpetrator. The Applicant also recalled that trial counsel further pointed out the inconsistencies in the victim's testimony at trial.

The Applicant testified further that he mentioned his alibi to trial counsel prior to trial. He testified that his child's mother Shamira Holmes was his alibi witness and that he was at home with her during the time the crime took place. He testified that he does not recall trial counsel requesting the names of potential witnesses. The Applicant testified that trial counsel went to speak with Holmes about a handwritten note, but did not discuss the Applicant's alibi with Holmes. The Applicant testified that he would have called Holmes to testify at the PCR hearing, but Holmes no longer wishes to testify on his behalf or get involved. The Applicant testified further that he is not sure if his case were retried if he would take the stand to testify about his alibi.

The Applicant testified that trial counsel should have objected to the malice jury charge. He also testified that trial counsel should have requested an in-court line up. He testified that trial counsel told him that an in-court line up would have been a bad idea. The Applicant testified that he was given a plea offer of thirty (30) years, but that he did not take the plea because it was his understanding that the case could easily be won. He testified that trial counsel told him that his case could be won and that he would be going home soon. Lastly, the Applicant testified that he did not want to receive thirty (30) years for something he did not do and that he understood he was facing death if he proceeded to trial.

Trial counsel, Cory Fleming, Esquire, testified at the evidentiary hearing that his wife, Eve Fleming, was originally appointed to represent the Applicant and that he was appointed to

represent the Applicant when the Applicant was noticed for the death penalty. Counsel testified that he then asked Timothy Kulp, Esquire to assist with the Applicant's defense. Counsel testified that Fleming handled the guilt phase and Kulp handled the penalty phase of the Applicant's trial.

Trial counsel testified that he objected to the in-court identification by the victims and filed a lengthy motion and brief prior to trial requesting that the Court reconsider its ruling. Counsel testified that he felt an in-court line-up was not necessary because the damage had already been done. Counsel testified that a live line-up would have further validated the in-court identifications by the victims. Counsel testified further that he believed he addressed the inconsistencies of the victim's testimony at trial on cross-examination. He testified that an objection based on the in-court identification would not have had any effect as it has already been ruled upon by the trial judge.

Counsel, Corey Fleming testified further that all of the lawyers working on the Applicant's case interviewed potential witnesses. Oftentimes, the investigator and mitigation coordinator working on the case were present when witnesses were interviewed. Fleming testified that he interviewed Shamira Holmes for mitigation purposes and she never indicated that she was the Applicant's alibi witness. Fleming testified that Holmes provided no alibi and only said that she had braided the Applicant's hair that day. Fleming testified that had Holmes told him that she was the Applicant's alibi witness he would have investigated the matter. Fleming also testified that the Applicant never referred to Holmes as an alibi witness. However, Fleming testified that the Applicant gave him the name of another potential alibi witness that lived on St. Helena. He testified that when he went to visit the witness, the witness provided no alibi for the Applicant and made some indication that he was willing to provide perjured

testimony on the Applicant's behalf at trial. Fleming testified that he could not put up perjured testimony and that he felt the testimony of the alibi witness was not credible based on his interview of the witness.

Fleming testified that he did not see the prosecutor's comments in the State's closing to be objectionable. He testified that had they been objectionable he would have objected. Counsel testified that when the prosecutor used the term "you" throughout his closing, he was not referring to the jury specifically, but was using the term as if to say "one might". Counsel testified that he felt that some of Solicitor Murdaugh's statements may have been close to the line, but none of the solicitor's statements were harmful and agreed it is possible that the statements could be misinterpreted in the transcript. Lastly, counsel testified that the malice charge given by the judge to the jury was not objectionable and was the standard malice charge at that time. Fleming discussed 2009 change in the law pursuant to the S.C. Ruling in State v. Belcher<sup>3</sup>.

Trial counsel, Timothy Kulp, Esquire, also testified at the evidentiary hearing. Kulp testified that he was brought in by Fleming because the case was one in which the Applicant was facing the death penalty. Kulp testified that he filed a brief in support of the Applicant's argument in the Neil v. Biggers hearing. He testified that after the Court ruled in the State's favor he filed a forty or fifty page motion for reconsideration. Counsel testified that the motion addressed the science of witness identification, the inconsistency in testimony, and the victim's previous exposure to the Applicant. Counsel testified that his motion for reconsideration was ultimately denied. Counsel testified that the Judge Gregory suggested a live line-up, but that they were concerned that the witnesses had already been tainted by previous exposure and it would

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<sup>3</sup> 385 S.C. 597, 600, 685 S.E.2d 802, 804 (2009).

have been easier to identify the Applicant and nail down the previous identification and determined after a lengthy discussion and consideration not to so.

Lastly, counsel testified that a plea offer was extended to the Applicant two to three weeks prior to trial. Counsel testified that he thought that the Applicant would max out after twenty-three (23) years. He testified that ultimately the Applicant did not even consider the plea and rejected the plea offer.

This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds trial counsel extensively conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in their representation.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have objected to the comments made by the prosecutor during the State's closing statement. "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Brown v. State, 383 S.C. 506, 515-516, 680 S.E.2d 909, 914 (2009) (citing Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004)). "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." Id. (citing State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006)(overruled on other grounds)).

This Court finds that the Solicitor Murdaugh's comments during the State's closing were not objectionable and was not a "golden rule" argument. 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. This Court finds further that the testimony was not objectionable and its purpose was not to appeal to the personal biases of the jury. This Court finds that trial counsel was not ineffective

for failing to object to the solicitor's closing statement when the comments were not objectionable and were not an impermissible "golden rule" argument and any significant objection would only highlight some perceived significance.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have objected to the prior inconsistent statements of the victims identifying the Applicant and that counsel should have requested a live show-up. This Court finds that trial counsel argued vigorously against the in-court identification by the victims during the Applicant's Neil v. Biggers hearing. This Court finds that trial counsel also filed a lengthy motion to reconsider on the Applicant's behalf after the in-court identification was allowed. Trial counsel gave credible testimony that it was not in the Applicant's best interest to have a live show-up identification because it would further validate an already questionable identification by the victims. This Court finds that despite the admission of the in-court identification, the record reflects that trial counsel was able to successfully address the inconsistencies in the victim's identification of the Applicant on cross-examination. This Court finds that trial counsel was not ineffective for not objecting to the prior inconsistent statements of the victim identifying the Applicant. This Court finds further that trial counsel was not ineffective for not requesting a live show-up and in fact was in the Applicant's best interest.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have investigated Shamira Holmes more thoroughly as an alibi witness. "In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation on what the witnesses' testimony would have been cannot, by itself,

satisfy the applicant's burden of showing prejudice.” Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

This Court finds that trial counsel was not ineffective for failing to call Shamira Holmes as an alibi witness at trial. This Court finds further that the Applicant did not support his claim of ineffectiveness for failing to call an alibi witness at the evidentiary hearing because Holmes did not testify at the evidentiary hearing. This Court finds that the Applicant’s mere speculation as to what Holmes’ testimony would have been is insufficient to support his claim, especially in light of the Applicant’s testimony that Holmes was not present at the evidentiary hearing because she no longer wanted to testify on the Applicant’s behalf. This Court finds that trial counsel gave credible testimony that the Applicant never indicated that Holmes an alibi witness. This Court also finds that trial counsel gave credible testimony that the alibi witness provided by the Applicant (other than Holmes) was found not credible and unable to account for the Applicant’s whereabouts during the time the crimes were committed.

This Court finds that the Applicant has failed to carry his burden of proving that trial counsel should have objected to the malice charge given by the judge to the jury. This Court finds that the malice charge given by the trial judge was the standard malice charge at that time and was appropriate for the Applicant’s case. This Court further finds that the Courts ruling in State v. Belcher in no way affected the appropriateness of the malice charge given in the Applicant’s case because no evidence was provided that would “reduce, mitigate, excuse or justify the homicide.” State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 804 (2009). This Court finds trial counsel was not ineffective for failing to object to the malice charge given to the jury.

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland- that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### **All Other Allegations**

As to any and all allegations that were raised in the application at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore they are hereby denied and dismissed.

#### **CONCLUSION**

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice;  
and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 31 day of December, 20 12



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The Honorable Carmen T. Mullen  
Presiding Judge  
14th Judicial Circuit

Beaufort, South Carolina.

TAVARUS L. ROGERS SR #244362  
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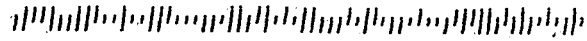
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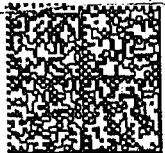
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