MISSOURI COURT OF APPEALS
WESTERN DISTRICT

VERMONN T. ROBERTS

APPELLANT,

v.

STATE OF MISSOURI

RESPONDENT.

DOCKET NUMBER WD72575

DATE: October 11, 2011

Appeal From:

Clay County Circuit Court
The Honorable Anthony R. Gabbert, Judge

Appellate Judges:

Division Two: Thomas H. Newton, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

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Attorneys:

Susan E. Summers, Kansas City, MO, for appellant.

Shaun J. Mackelprang and Daniel N. McPherson, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

VERMONN T. ROBERTS,

APPELLANT,

v.

STATE OF MISSOURI,

RESPONDENT.

No. WD72575 Clay County

Before Division Two: Thomas H. Newton, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Vermonn Roberts appeals from the motion court's judgment denying her Rule 29.15 motion for post-conviction relief after an evidentiary hearing. Roberts contends that the motion court clearly erred in denying her motion because: (1) trial counsel failed to adequately prepare for, and put on mitigation evidence at, Roberts's sentencing hearing; (2) Roberts was denied her constitutional right to counsel because her trial counsel was not a duly licensed attorney; (3) trial counsel was ineffective because he failed to comply with Supreme Court Rule 9.03 pertaining to visiting attorneys and was so deficient in his overall performance as to deny Roberts her constitutional right to counsel; and (4) trial counsel persuaded Roberts to waive jury sentencing.

Affirmed.

Division Two holds:

(1) The motion court's finding that Roberts failed to prove trial counsel rendered ineffective assistance was not clearly erroneous in light of the fact that all but one of the witnesses Roberts claims should have been called to testify would have offered nothing more with their testimony than what was testified to by the family spokesman and covered in the letters that were submitted. Trial counsel will not be found ineffective for failing to present cumulative evidence. Roberts also failed to demonstrate the prejudice she claims--that but for her trial counsel's ineffectiveness, she would have received a lesser sentence.

(2) Roberts's trial counsel was a duly licensed attorney, even though her attorney failed to address technical requirements associated with the authorized practice as a visiting attorney in a state other than the state of licensure. Roberts's constitutional right to counsel was not violated.

(3) Roberts's bare assertion, unsupported by any authority, that an attorney's failure to comply with a *pro hac vice* rule constitutes ineffective assistance of counsel is rejected.

(4) Roberts cannot demonstrate the "prejudice" she claims--that but for the ineffective assistance of counsel, she would either have been acquitted or convicted of a lesser included offense. Roberts was originally charged with first degree murder. She was not convicted of first

degree murder. She was convicted of the lesser included offense of second degree murder. Roberts offers no specifics with respect to how additional depositions, witness interviews, motions or other actions by trial counsel would or could have permitted a jury to convict her of voluntary or involuntary manslaughter in lieu of second degree murder.

(5) The decision to waive a jury trial is a matter of trial strategy and consequently does not provide a basis for post-conviction relief. Roberts failed to demonstrate a reasonable probability that but for trial counsel's advice, the jury would have imposed a lesser sentence.

Opinion by Cynthia L. Martin, Judge October 11, 2011

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