

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Thomas A. Russo, Circuit Court Judge

Opinion No. 5110 (S.C. Ct. App. filed 4/3/2013)

10-GS-21-0254

THE STATE,

RESPONDENT,

V.

ROGER BRUCE,

PETITIONER

APPELLATE CASE NO. 2011-197635

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and was ruled on by the Court of Appeals on May 6, 2013.

QUESTIONS PRESENTED

- I. Whether the Court of Appeals erred in asking the lower court to determine if petitioner “had a legitimate expectation of privacy in the trunk of Creel’s car...” when the Fourth Amendment violation occurred at the moment the police seized the car keys in petitioner’s apartment without his consent and without a search warrant?
- II. Whether the Court of Appeals erred in asking the lower court to determine if the error in admitting the evidence was harmless when a trial judge is not to sit in judgment of his own decision and it is the job of the reviewing court to determine if an error is harmless?
- III. Whether the Court of Appeals erred in asking the lower court to make additional findings when the State failed to present an adequate record when it had the chance to do so?

STATEMENT OF THE CASE

Petitioner was convicted of murder after a jury trial held before the Honorable Thomas A. Russo on August 8, 2011, in Florence County. A life sentence was imposed.

Petitioner appealed his conviction and submitted a final brief on May 23, 2012. Respondent submitted its final brief on June 12, 2012. Oral argument was heard in the Court of Appeals on January 9, 2013. On April 3, 2013, the Court issued an opinion remanding this case for additional findings. State v. Bruce, __S.C.__, 741 S.E.2d 590 (Ct. App. 2013). A petition for rehearing was filed on April 18, 2013, and was denied on May 6, 2013.

This petition follows.

ARGUMENT I

The Court of Appeals erred in asking the lower court to determine if petitioner “had a legitimate expectation of privacy in the trunk of Creel’s car...” when the Fourth Amendment violation occurred at the moment the police seized the car keys in petitioner’s apartment without his consent and without a search warrant.

During the motion to suppress the fruits of the search of the victim’s car, the trial court asked where the car was parked. The solicitor said it was parked on the driveway at the back of the apartment where petitioner and the victim lived. Petitioner and the victim lived together for at least fourteen years. The police took the keys to the car from inside the apartment without permission. (ROA p. 120, lines 5 – 21). The police had no search warrant for the keys. It was the taking of the keys from the house without permission and without a warrant that was the Fourth Amendment violation. Anything found as a result of that violation was the fruit of the poisonous tree. Wong Sun v. U.S., 371 U.S. 471, 83 S.Ct. 407 (1963).

ARGUMENT II

The Court of Appeals erred in asking the lower court to determine if the error in admitting the evidence was harmless when a trial judge is not to sit in judgment of his own decision and it is the job of the reviewing court to determine if an error is harmless.

On remand, the Court of Appeals in its opinion instructed the lower court to determine if the error in admitting the evidence was harmless. A trial judge, however, is not to sit in judgment of his own decision. State v. Floyd, 303 S.C. 298, 400 S.E.2d 145 (1991). It is the job of the reviewing court to determine if an error is harmless. State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012); State v. Salley, 398 S.C. 160, 727 S.E.2d 740 (2012); Ex parte Crymes, 630 So. 2d 125 (Ala. 1993); Driven v. Com., 361 S.W.3rd 877 (Ky. 2012).

ARGUMENT III

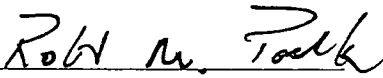
The Court of Appeals erred in asking the lower court to make additional findings because the State failed to present an adequate record when it had the chance to do so.

The Court of Appeals also asked the lower court to make additional findings, but the State should not be allowed to introduce any new evidence as the solicitor had his chance to make the record he did make. Any further attempt to introduce additional facts raises the question of double jeopardy and collateral estoppel. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978); Williams v. State, 313 Ga. App. 840, 846, 726 S.E.2d 66, 71 (Ga. App. 2012). The record in this case is insufficient to support the admissibility of any evidence seized from petitioner's residence in violation of the Fourth Amendment and any evidence that was the fruit of the poisonous tree is also inadmissible.

CONCLUSION

Petitioner's writ should be granted.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER.

This 4th day of June, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County
Thomas A. Russo, Circuit Court Judge

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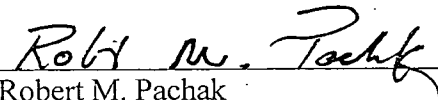
V.

ROGER BRUCE,

PETITIONER

CERTIFICATE OF SERVICE

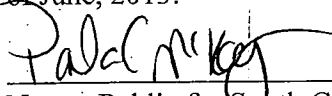
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the S.C. Court of Appeals this 4th day of June, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of June, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022