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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

August 19, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: State of South Carolina v. Roger Bruce

Dear Mr. Shearhouse:

Enclosed is a copy of petition for writ of certiorari and the motion for leave to proceed *in forma pauperis* which I have filed today in the United States Supreme Court. Please contact me if you have any questions.

Sincerely,

Robert M. Pachak
Appellate Defender

RMP/blw

Enclosure

cc: Brendan J. McDonald, Esquire

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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

August 19, 2015

The Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, DC 20543

Re: State of South Carolina v. Roger Bruce

Dear Mr. Harris:

Enclosed is Petitioner's Certificate of Filing by Mail in the above-referenced case.

Sincerely,

Robert M. Pachak
Appellate Defender

RMP/blw

Enclosure

cc: Brendan J. McDonald, Esquire
The Honorable Daniel E. Shearouse

No. _____

In the Supreme Court of the United States

ROGER BRUCE, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

CERTIFICATE OF FILING BY MAIL

I hereby certify that I am a member of the Bar of this Court and that on August 19, 2015, I filed the petition for writ of certiorari and appendix in the above-referenced case, together with a motion for leave to proceed in forma pauperis, by causing the originals and ten copies of the same to be deposited in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court.

Robert M. Pachak
Counsel of Record

SUBSCRIBED AND SWORN TO before me
this 19th day of August, 2015.
_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Roger Bruce — PETITIONER
(Your Name)

VS.

State of South Carolina RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

☐ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

_____

_____

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☐ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☑ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☑ The appointment was made under the following provision of law: Rule 608, SCACR, or

☐ a copy of the order of appointment is appended.

Roger Bruce
(Signature)

Sworn to and subscribed before me this
14th day of August, 2015

Notary Public State of South Carolina
My Commission Expires: October 30, 2022

No. _____

In the Supreme Court of the United States

ROGER BRUCE, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

CERTIFICATE OF SERVICE

I certify that copies of the motion for leave to proceed in forma pauperis have been served upon opposing counsel, Brendan J. McDonald, Esquire, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 19th day of August, 2015.

Robert M. Pachak
Counsel of Record

SWORN TO BEFORE me this 19th day of August, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

No. _____

In the Supreme Court of the United States

ROGER BRUCE, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

ROBERT M. PACHAK
Counsel of Record
Appellate Defender
SOUTH CAROLINA COMMISSION
ON INDIGENT DEFENSE
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Post Office Box 11589
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QUESTION PRESENTED

Whether the police violated the Fourth Amendment when they took car keys from petitioner's residence without his consent and without a search warrant to search the contents of the victim's car where her body was found in the trunk?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the South Carolina Supreme Court were petitioner, Roger Bruce, and respondent, State of South Carolina.

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TABLE OF AUTHORITIES

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CITATIONS OF REPORTS OF OPINIONS AND ORDERS

The first report dealing with petitioner's Fourth Amendment claim was in an opinion published by the South Carolina Court of Appeals in State v. Roger Bruce, 402 S.C. 621, 741 S.E.2d 590 (Ct.App.2013). After granting certiorari the South Carolina Supreme Court upheld the seizure of petitioner's car keys in a published opinion on May 27, 2015. State v. Roger Bruce, 412 S.C. 504, 772 S.E.2d 753, (2015)

BASIS OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257 (a) because petitioner is asserting the deprivation of a right secured by the Fourth Amendment to the United States Constitution. The South Carolina Court of Appeals opinion on April 3, 2013, remanded petitioner's case to the trial court for further findings on the Fourth Amendment issue. On petition for certiorari to the South Carolina Supreme Court in an opinion filed May 27, 2015, the court held that the Fourth Amendment was not violated.

CONSTITUTIONAL PROVISION

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

STATEMENT OF THE CASE

Petitioner was convicted of murder in the shooting death of his girlfriend whom he had lived with for 15 years.

On October 12, 2009, around 11:00 Officer Gary Beckett with the Florence, S.C. Police Department was dispatched to 1450 King Avenue for a welfare check on the victim, Laura Creel. (ROA p. 112, line 16- p. 113, line 5). The victim's son had called the police and told them he had not seen or spoken to the victim in about three days. (ROA p. 115, line 20- p. 116, line 3). The victim lived in a garage apartment with petitioner. The apartment was behind the main house on 1450 King Avenue. Her vehicle was there. (ROA p. 113, lines 3-23). Officer Beckett walked to the apartment with Cpl. Hobgood and Officer Starling. Beckett said he saw someone looking out a screened door. He shined a flashlight and it was petitioner. The police explained they were doing a welfare check on the victim and asked if she may be inside[1]. Petitioner told them she was not inside and they asked if they could come in and take a quick look. Petitioner gave them permission to come inside. Beckett said he did not notice anybody else inside. (ROA p. 116, line 19- p. 117, line 24) They asked petitioner when was the last time he may have talked to the victim or seen her. Petitioner said he and the victim had an argument a few days earlier and then she left. He didn't know where she went. (ROA p. 118, lines 14-23)

---

[1] Beckett said, "so we just asked him if we could come in and take a quick look and make sure that she wasn't inside..." (ROA p. 117, lines 13-15) When asked whether it was a quick scan, he said, "I say more or less a quick scan because, I mean, we wasn't going through dresser drawers and stuff. We were just looking for a person." (ROA p. 118, lines 11-13)

Officer Beckett then said they noticed a cell phone and some keys which were consistent with the vehicle outside. They asked whose phone and petitioner said it was the victim's. Then Cpl. Hobgood picked up the keys and went outside to the vehicle. He shined a flashlight through the windows and everything appeared fine inside. He attempted to open the trunk. At this point defense counsel objected and the jury was sent out. (ROA p. 119, lines 1- 25). Defense counsel objected to the evidence concerning police opening the trunk and finding the victim's body. The police had no search warrant and did not get consent from petitioner to search the vehicle. The trial court questioned about petitioner's standing to raise the issue, but defense counsel noted that the car was on his property parked on the driveway at the back of his house and the keys were in his house. The police did not ask permission to take the keys. (ROA p. 120, line 6- p. 121, line 21).

The solicitor then tried to argue that in a pre-trial hearing Cpl. Hobgood had testified that petitioner went for the keys to show them which key to open the truck with before the police used the trunk release button. (ROA p. 121, line 22- p. 122, line 11). Contrary to the solicitor's assertion, a review of Cpl. Hobgood's testimony from the day before does not show that petitioner went for the keys to show them how to open the trunk. (ROA p. 33, line 7- p. 38, line 2). Later in the trial, Cpl. Hobgood did testify that petitioner tried to grab the keys and Hobgood did not know what peitioner's intentions were so he pulled the keys back. (ROA p. 144, line 10- p. 145, line 18).

Even though the trial court did not have the correct information before it, it

held the issue was one of inevitable discovery: "but/for hitting the trunk release button and opening the trunk according to the earlier testimony Mr. Bruce was going to open the trunk for them, or at least was providing the keys to do so." (ROA p. 122, line 12-16).

The trial court's ruling was argued to be in error. The prosecution had the burden of showing by preponderance of the evidence that the items seized would ultimately have been discovered lawfully even though it was obtained by an illegal seizure. Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct 2501 (1984). The prosecution had not met that burden. See, State v. Brown, 389 S.C. 473, 698 S.E.2d 811, 817 (Ct. App. 2010). The prosecution had also not shown why they could not have obtained a search warrant for the car keys or why they could not have asked for consent in accordance with the Fourth Amendment to the United States Constitution. The trial court did not even address the fact that the initial seizure of the keys was in violation of the Fourth Amendment.

The South Carolina Court of Appeals issued a published opinion and held that the trial court's findings were inadequate for appellate review. They remanded the case to the trial court to determine (1) whether the petitioner had a legitimate expectation of privacy in the victim's car, (2) whether petitioner consented to the search, and (3) if the police violated petitioner's Fourth Amendment rights, whether the exclusionary rule applied. (App. A1-A4) A petition for rehearing was filed on April 18, 2013. (App. A5) The order denying rehearing was filed on May 6, 2013. (App. A5-A7)

A petition for writ of certiorari was filed on June 4, 2013. Petitioner noted that the Fourth Amendment violation occurred at the moment the police seized the car keys from petitioner's apartment without his consent and without a search warrant. (App. A9-A18) The South Carolina Supreme Court granted certiorari on June 12, 2014. (App. A19) The brief of petitioner was submitted on July 14, 2014. (App. A21-A40) Oral argument was held on February 4, 2014. The South Carolina Supreme Court issued their opinion on May 27, 2015. (App. A41-A45) The majority held that the seizure of the car keys found on the table in petitioner's home to open the trunk of the victim's care fell within the scope of petitioner's consent for the police to enter his home to perform a welfare check for the victim.

Justice Pleicones dissented and found that the seizure of the care keys exceeded the scope of petitioner's consent. (App. A45-A46)

REASONS FOR GRANTING THE PETITION

In Smith v. Ohio, 494 U.S. 541, 110 S.Ct 1288 (1990) this Court commented on the Ohio Supreme Court's decision that held that a "search was constitutional because it fruits justified the arrest that followed." This court wrote:

> That reasoning, however, "justify[ing] the arrest by the search and at the same time ... the search by the arrest," just "will not do." *Johnson v. United States* 333 U.S. 10, 16-17, 68 S.Ct. 367, 370, 92 L.Ed. 436 (1948). As we have had occasion in the past to observe, "[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." *Sibron v. New York*, 392 U.S. 40, 63, 88 S.Ct. 1889, 1902, 20 L.Ed2d 917 (1968); see also *Henry v. United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 171 4 L.Ed.2d 134 (1959); *Rawlings v. Kentucky*, 448 U.S. 98, 111, n.6, 100 S.Ct. 2556, 2564 n. 6, 65 L.Ed.2d 633 (1980). The exception for searches incident to arrest permits the police to search a lawfully arrested person and areas within his immediate control. Contrary to the Ohio Supreme Court's reasoning, it does not permit the police to search any citizen without a warrant or probable cause so long as an arrest immediately follows.

494 U.S. at 543, 110 S.Ct. at 1290.

Counsel for petitioner would suggest that the above criticism would also apply to the trial court, the South Carolina Court of Appeals, and the South Carolina Supreme Court in their decisions refusing to suppress the evidence taken beginning from the wrongful seizure of the car keys.

In Florida v. Jimmeno, 500 U.S. 248, 111 S. Ct. 1801 (1991) this court wrote as follows:

> The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective"

> reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?

500 U.S. at 251; 111 S.Ct. at 1803-1804.

Based on the above standard there can be no doubt what Office Beckett meant when he said, "so we just asked him if we could come in and take a quick look and make sure that she wasn't inside..." (ROA p. 117, lines 13-15) When consenting to that request, a reasonable person would have understood it to mean exactly was asked. Officer Beckett even explained a short while later when he said "I say more or less of a quick scan because, I mean, we weren't going through dresser drawers and stuff. We were just looking for a person." (ROA, p. 118, lines 11-13) How anyone consenting to a quick look for a person to mean yes you can seize car keys without my consent?

As the dissent in petitioner's case noted by citing Walter v. United States, 447 U.S. 649, 100 S. Ct. 2395 (1980), consent to search a garage does not implicitly authorize search of an adjoining house. The majority opinion relied on United States v. Jones, 356 F. 3rd 529, 534 (4th Cir. 2004) for the proposition that a "suspect's failure to object (or withdraw his consent) when an officer exceeds limits allegedly set by the suspect is a strong indicator that the search was within the proper consent search." (quoting Jones) (App. A44- A45)

The majority failed to recognize that in Jones the officers searched a number of personal items with the consent of the individuals in a hotel room. One officer noticed a duffle bag and Jones said "[w]hat you're looking for is in that bag and it's all mine,

no one else's, it's all mine." Jones confirmed the bag was his and when the officer asked him if he could search it, Jones answered, "[s]ure, go ahead." The officer opened the bag and found a loaded weapon, a locked metal box, and a set of keys. He opened the box with one of the keys and found crack cocaine and cash. 356 F. 3d at 532.

In United States v. Neely, 564 F. 3d 346 (4th Cir. 2009) the court held that a defendant's consent to a search of his trunk did not include the entire vehicle. The court distinguished the Jones case as follows.

> The defendant in Jones told officers that "what you're looking for is in that bag" and responded "sure, go ahead" when the officers requested permission to search the bag. *Id.* at 532. The locked box at issue in that case was within the bag that the defendant gave officers permission to search. Because the item in question was physically within the location already consented to, it is reasonable for officers to believe that silence is an indication that they have not exceeded the boundaries of the defendant's original consent. *Jones* is thus inapposite to the specific circumstances presented here. The interior of Neely's car is not physically part of his trunk in the manner that the Jones lockbox was physically within the duffel bag and, thus, within the express scope of the consent search.
>
> * * *
>
> Because Neely's original consent did not physically encompass the interior of his vehicle, under specific circumstances of this case, we do not find his silence sufficiently persuasive to overcome the limitation he originally placed on the search.

564 F.3d at 351

CONCLUSION

For the reasons stated above, the fruits of the search should not justify the seizure of the car keys without consent and without a warrant. Petitioner's motion to suppress anything that was the fruit of the poisonous tree should have been granted. The Court should grant the writ of certiorari in this case.

Respectfully submitted,

Robert M. Pachak
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

August 19, 2015

No. _____

In the Supreme Court of the United States

ROGER BRUCE, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case together with a motion for leave to proceed in forma pauperis have been served upon opposing counsel for Respondent, the State of South Carolina, Brendan J. McDonald, Esquire, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 19th day of August, 2015.

Robert M. Pachak

ROBERT M. PACHAK
Counsel of Record

SWORN TO BEFORE me this 19th day of August, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

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APPENDIX

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ATTORNEY FOR PETITIONER

APPENDIX

402 S.C. 621
Court of Appeals of South Carolina.

The STATE, Respondent,
v.
Roger BRUCE, Appellant.
Appellate Case No.2011-197635.

No. 5110. | Heard Jan. 9, 2013. | Decided April 3, 2013. | Rehearing Denied May 6, 2013. | Certiorari Granted June 12, 2014.

Synopsis
Background: Defendant was convicted in the Circuit Court, Florence County, Thomas A. Russo, J., of murder, and was sentenced to life imprisonment. Defendant appealed.

[Holding:] The Court of Appeals, Few, C.J., held that trial court's summary overruling of defendant's motion to suppress created record inadequate to permit appellate review.

Remanded.

West Headnotes (4)

[1] **Criminal Law**
⇐ Sufficiency, consistency

Trial court's summary overruling of murder defendant's motion to suppress evidence of discovery of victim's body in trunk of victim's car created record inadequate to permit appellate review; while trial court apparently ruled that inevitable discovery exception to exclusionary rule applied, it did so without basis in evidence, as state presented no evidence that it would have inevitably discovered victim's body by some other means, and without first determining that police violated defendant's Fourth Amendment rights. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[2] **Criminal Law**
⇐ Wrongfully Obtained Evidence

When a criminal defendant moves to suppress evidence on Fourth Amendment grounds, the trial court must first determine whether the defendant has a legitimate expectation of privacy in the searched premises; if it so determines, it must then determine whether the police violated his Fourth Amendment rights. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[3] **Criminal Law**
⇐ Questions of law or fact

Criminal Law
⇐ Necessity of setting forth grounds of admissibility

Whether a defendant may challenge a search, whether the police violated a defendant's Fourth Amendment rights, and whether to apply the exclusionary rule are mixed questions of law and fact; unless the trial court makes sufficiently specific factual findings on the record, a reviewing court has no basis on which to review those findings or the trial court's legal conclusions. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[4] **Criminal Law**
⇐ Searches, seizures, and arrests

Trial court has no need to consider whether the exclusionary rule applies to seized evidence until it has first determined the police violated the defendant's Fourth Amendment rights in seizing it. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

Attorneys and Law Firms

**590 Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General **591 Donald J. Zelenka, and Assistant Attorney

General Brendan J. McDonald, all of Columbia, for Respondent.

Opinion

FEW, C.J.

*622 [1] Roger Bruce was convicted of murdering his girlfriend Laura Creel. On appeal, he argues the trial court erred in admitting evidence of the discovery of Creel's body, which police found in the trunk of her car, because he claims the search violated his Fourth Amendment rights. In ruling on the issue at trial, the court did not make adequate factual findings or legal conclusions. Rather, the court summarily stated, "I'm going to overrule the objection and allow it." We hold the trial court's findings are inadequate for appellate review. We remand to the trial court to determine (1) whether Bruce had a legitimate expectation of privacy in the trunk of Creel's car, (2) whether Bruce consented to the search, and (3) if the police violated Bruce's Fourth Amendment rights, whether the exclusionary rule applies.

***623 I. Facts and Procedural History**

Late in the evening on October 12, 2009, Creel's son contacted the Florence police department, requesting the police check on Creel at the apartment she shared with Bruce. He told the police he had not heard from her or seen her in "a couple of days." He also informed them that Creel's "goldish" 1997 Chrysler Concord was parked at the apartment and that Bruce had called him from Creel's cell phone.

As officers Gary Beckett, Charles Hobgood, and Steven Starling approached the apartment on foot, they saw Bruce looking out of the apartment's screen door. The officers explained to Bruce they were there to check on Creel and asked if she was home. When Bruce answered no, the officers asked if they could "take a quick look and make sure that she wasn't inside," and he consented. After briefly scanning the residence, the officers observed a cell phone and keys on a table. The keys were consistent with the vehicle parked outside the apartment, and the vehicle was consistent with the description given by Creel's son. Bruce stated the keys and cell phone belonged to Creel, which prompted Hobgood to pick up the keys and walk toward her car, along with the other officers and Bruce.

Hobgood looked through the car windows with his flashlight, searching for "maybe a pocketbook" or "something that may give us an idea where she may be." Hobgood then attempted to open the trunk but was unsuccessful. Hobgood testified Bruce asked, "well, you want me to show you what key[?]" [1] At that point, Bruce "walked towards" Hobgood "with his arm out like he was going to grab the keys," causing Hobgood to instruct Bruce to tell him which key opened the trunk rather than show him. Hobgood testified he was not sure what Bruce's intent was when he walked toward him. However, both Beckett and Starling testified it appeared Bruce walked toward Hobgood with the intent to help him find the correct key. During Hobgood's exchange with Bruce, Starling "got the keys from Hobgood" and pushed the trunk release button, which opened the trunk and revealed a female body, later identified to be Creel.

*624 At trial, Bruce moved to suppress the discovery of the body, arguing the search violated his Fourth Amendment rights because the officers had no search warrant and he had not consented to the search of the car. The court asked, "What standing would he have to object to a search of a vehicle that was not his?" Counsel responded Bruce could make the challenge based on the fact that the car was on his property and the keys were found inside his apartment. The State argued that Bruce had no expectation of privacy in Creel's car, and that he consented to the search and even offered to help the officers open the trunk.

After the court heard counsels' arguments, it stated,

> It appears that this is inevitable discovery; but for hitting the trunk release button and opening the trunk according to the **592 earlier testimony Mr. Bruce was gonna open the trunk for them, or at least was providing the keys to do so.

The court then ruled, "I'm going to overrule the objection and allow it." The jury found Bruce guilty and the court imposed a life sentence.

II. The Sufficiency of the Court's Fourth Amendment Ruling

[2] When a criminal defendant moves to suppress evidence on Fourth Amendment grounds, the trial court must first determine whether the defendant has a legitimate expectation of privacy in the searched premises. *See State v. Crane*, 296 S.C. 336, 341, 372 S.E.2d 587, 589 (1988) ("Because appellant cannot make the threshold demonstration of a legitimate expectation of privacy in connection with

the searched premises, he is not entitled to launch the constitutional challenge to the search."); *State v. McKnight,* 291 S.C. 110, 114–15, 352 S.E.2d 471, 473 (1987) (stating a defendant who seeks to have evidence suppressed on Fourth Amendment grounds "must establish that his *own* Fourth Amendment rights were violated" by "demonstrat[ing] a legitimate expectation of privacy in connection with the searched premises"). If the trial court finds the defendant had a legitimate expectation of privacy, it must then determine whether the police violated *his* Fourth Amendment rights. *See, e.g., State v. Missouri,* 361 S.C. 107, 115, 603 S.E.2d 594, 598 (2004) (holding defendant had a legitimate expectation of privacy, which entitled him to challenge ***625** the search under the Fourth Amendment); *State v. Rivera,* 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct.App.2009) (" 'Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent.' " (quoting *Palacio v. State,* 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999))). If the trial court finds the police violated the defendant's own Fourth Amendment rights, it must then determine whether the evidence should be excluded pursuant to the exclusionary rule. *See State v. Weston,* 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (stating "[s]uppression is appropriate in only a few situations"); *State v. Sachs,* 264 S.C. 541, 566, 216 S.E.2d 501, 514 (1975) (stating "[t]he exclusionary rule is harsh medicine," and "[e]xclusion should be applied only where [the purpose of] deterrence is clearly subserved").

[3] Whether a defendant may challenge a search, whether the police violated a defendant's Fourth Amendment rights, and whether to apply the exclusionary rule are mixed questions of law and fact. *See United States v. Gray,* 491 F.3d 138, 145 (4th Cir.2007) (stating "the expectation [of privacy] must be one which the law recognizes as legitimate," meaning it "must be objectively reasonable ... by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society" (internal quotations and citation omitted)); *State v. Austin,* 306 S.C. 9, 17, 19, 409 S.E.2d 811, 816, 817 (Ct.App.1991) (stating whether a legitimate expectation of privacy exists "depends on a factual determination" and "is a question of fact"); *State v. Tindall,* 388 S.C. 518, 523 n. 5, 698 S.E.2d 203, 206 n. 5 (2010) (stating that when addressing a challenge under the Fourth Amendment, an appellate court "must ask first, whether the record supports the trial court's [factual] findings ... and second, whether these facts support a finding that the officer" did not violate the defendant's Fourth Amendment rights); *United States v. Allen,* 159 F.3d 832, 838 (4th Cir.1998) (explaining "mixed questions of law and fact are involved" in an inevitable discovery ruling). Unless the trial court makes sufficiently specific factual findings on the record, this court has no basis on which to review those findings or the trial court's legal conclusions. *See generally State v. Blackwell–Selim,* 392 S.C. 1, 4, 707 S.E.2d 426, 428 (2011) (holding because the trial court ***626** failed to make specific findings of fact to support its ruling, "there was nothing for the Court of Appeals to review").

[4] In admitting the evidence of the discovery of Creel's body, the trial court stated, "It appears that this is inevitable discovery." The court's statement suggests it admitted the evidence under the inevitable discovery doctrine, which is an exception to the exclusionary rule. *State v. Jenkins,* 398 S.C. 215, 227, 727 S.E.2d 761, 767 (Ct.App.2012). ****593** However, a trial court has no need to consider whether the exclusionary rule applies until it has first determined the police violated the defendant's Fourth Amendment rights. The record does not indicate the trial court ever made that determination.

Moreover, this does not appear to be a situation in which the inevitable discovery doctrine is properly applied. *See State v. Spears,* 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct.App.2011) (stating evidence may be admitted despite a violation of the Fourth Amendment "if the government can prove that the evidence would have been obtained *inevitably* " (emphasis added) (quoting *Nix v. Williams,* 467 U.S. 431, 447, 104 S.Ct. 2501, 2511, 81 L.Ed.2d 377, 389 (1984))). In this case, the State presented no evidence that it would have inevitably discovered Creel's body by some other means had the officers not searched the trunk of her car as they did. Therefore, because the record contains no evidence to support the trial court's statement regarding inevitable discovery and inadequate findings as to the requirements of the doctrine, we may not affirm on that basis. *See Jenkins,* 398 S.C. at 230, 727 S.E.2d at 769 (remanding issue of whether inevitable discovery doctrine applied because State did not present evidence in support of the doctrine and the determination "should not be made by this court on a blank record").

We remand with instructions that the trial court make findings consistent with this opinion. *See Austin,* 306 S.C. at 19, 409 S.E.2d at 817 (remanding for determination of whether the defendant "had a reasonable expectation of privacy" because trial court failed to make that determination when it admitted evidence pursuant to an exception to the exclusionary rule); *State v. Richburg,* 250 S.C. 451, 461, 158 S.E.2d 769, 773

(1968) (emphasizing the need for specific findings of fact when the legality of a search or seizure is raised); *627 *Jenkins*, 398 S.C. at 230–31, 727 S.E.2d at 769 (remanding issue of whether inevitable discovery doctrine applied). If the court determines Bruce had a legitimate expectation of privacy in the trunk of Creel's car, the police violated Bruce's Fourth Amendment rights by exceeding the scope of his consent, and the evidence should have been suppressed pursuant to the exclusionary rule, the court shall consider whether the error in admitting the evidence was harmless. If the court determines it erred and the error was not harmless, it shall grant a new trial. If the court determines it did not err in admitting the evidence, or the error was harmless, Bruce's conviction must be affirmed.

REMANDED.

WILLIAMS and PIEPER, JJ., concur.

All Citations

402 S.C. 621, 741 S.E.2d 590

Footnotes

1 There is conflicting testimony as to whether Hobgood asked Bruce which key opened the trunk or whether Bruce volunteered his help.

End of Document

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ROGER BRUCE,

APPELLANT

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

Opinion No. 5110

Appellate Case No. 2011-197635

PETITION FOR REHEARING

Pursuant to Rule 221(a), petitioner petitions this Court for rehearing concerning the following points that may have been overlooked or misapprehended. The opinion of the Court asks the lower court to determine if petitioner "had a legitimate expectation of privacy in the trunk of Creel's car..." The Fourth Amendment violation, however, occurred at the moment the police seized the car keys in petitioner's apartment without his consent and without a search warrant. Everything that followed after that was the fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1981). The lower court is then asked to determine if the error is harmless. But a trial judge 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.3d 877 (Ky. 2012).

The lower court is also asked 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 attempts 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, 314 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.

The petition for rehearing should be granted.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

This 18th day of April, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROGER BRUCE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of April, 2013.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 18th day of April, 2013.

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

The South Carolina Court of Appeals

The State, Respondent,

v.

Roger Bruce, Appellant.

Appellate Case No. 2011-197635

ORDER

After careful consideration of the Appellant's and Respondent's petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.

John Cannon Fw C.J.

J.

Daniel G. Pieper J.

Columbia, South Carolina

cc:
Robert M. Pachak
Brendan Jackson McDonald
Thomas A. Russo

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

Opinion No. 5110 (S.C. Ct. App. filed 4/3/2013)
10-GS-21-0254

THE STATE,

RESPONDENT,

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

The Supreme Court of South Carolina

The State, Respondent/Petitioner,

v.

Roger Bruce, Petitioner/Respondent.

Appellate Case No. 2013-001208
Lower Court Case No. 2010-GS-2100254

ORDER

We grant both the State and Bruce's petitions for a writ of certiorari to review the Court of Appeals' decision in *State v. Bruce*, 402 S.C. 621, 741 S.E.2d 590 (Ct. App. 2013). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

_____ J.

_____ J.

We would grant the State's petition for a writ of certiorari, but would deny Bruce's petition.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

June 12, 2014

RECEIVED

JUN 12 2014

OFFICE OF
STATE DEPT

cc:
The Honorable Jenny Abbott Kitchings
Robert M. Pachak, Esquire
Alan McCrory Wilson, Esquire
John W. McIntosh, Esquire
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Connie Reel-Shearin

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT/PETITIONER,

V.

ROGER BRUCE,

PETITIONER/RESPONDENT.

APPELLATE CASE NO. 2013-001208

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in asking the lower court to determine if petitioner/respondent "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/respondent'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/Respondent 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/Respondent 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, 402 S.C. 621, 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.

Petitioner/Respondent (Roger Bruce) filed a petition for writ of certiorari on June 4, 2013. Respondent/Petitioner (The State) filed a petition for writ of certiorari on June 5, 2013. On June 12, 2014, this Court issued an order granting both petitions for writ of certiorari.

This brief of Petitioner and Respondent (Roger Bruce) follows.

STATEMENT OF ISSUE ON DIRECT APPEAL

Whether the trial court erred in refusing to suppress evidence seized from petitioner/respondent's residence and a car in his backyard when the police took keys to the car from the residence without consent and without a search warrant?

STATEMENT OF THE FACTS AND ARGUMENT BELOW

On October 12, 2009, around 11:00 PM, Officer Gary Beckett with the Florence Police Department was dispatched to 1450 King Avenue for a welfare check on the victim, Laura Creel. (ROA p. 112, line 16 – p. 113, line 5). The victim's son had called the police and told them he had not seen or spoken to the victim in about three days. (ROA p. 115, line 20 – p. 116, line 3). The victim lived in a garage apartment with petitioner/respondent. The apartment was behind the main house on 1450 King Avenue. Her vehicle was there. (ROA p. 113, lines 3-23). Officer Beckett walked to the apartment with Cpl. Hobgood and Officer Starling. Beckett said he saw someone looking out a screened door. He shined a flashlight and it was petitioner/respondent. The police explained they were doing a welfare check on the victim and asked if she may be inside. Petitioner/respondent told them she was not inside and they asked if they could come in and take a quick look. Petitioner/respondent gave them permission to come inside. Beckett said he did not notice anybody else inside. (ROA p. 116, line 19 – p. 117, line 24). They asked petitioner/respondent when was the last time he may have talked to the victim or seen her. Petitioner/respondent said he and the victim had an argument a few days earlier and then she left. He didn't know where she went. (ROA p. 118, lines 14-23).

Officer Beckett then said they noticed a cell phone and some keys which were consistent with the vehicle outside. They asked whose phone and petitioner/respondent said it was the victim's. Then Cpl. Hobgood picked up the keys and went outside to the vehicle. He shined a flashlight through the windows and everything appeared fine inside. He attempted to open the trunk. At this point defense counsel objected and the jury was sent out. (ROA p. 119, lines 1-25). Defense counsel objected to the evidence concerning police opening the trunk and finding the victim's body. The police had no search warrant and did not get consent from petitioner/respondent

to search the vehicle. The trial court questioned about petitioner/respondent's standing to raise the issue, but defense counsel noted that the car was on his property parked on the driveway at the back of his house and the keys were in his house. The police did not ask permission to take the keys. (ROA p. 120, line 6 – p. 121, line 21).

The solicitor then tried to argue that previously Cpl. Hobgood had testified that petitioner/respondent went for the keys to show them which key to open the trunk with before the police used the trunk release button. (ROA p. 121, line 22 – p. 122, line 11). Contrary to the solicitor's assertion, a review of Cpl. Hobgood's testimony from the day before does not show that petitioner/respondent went for the keys to show them how to open the trunk. (ROA p. 33, line 7 – p. 38, line 2). Later in the trial, Cpl. Hobgood did testify that petitioner/respondent tried to grab the keys and Hobgood did not know what petitioner/respondent's intentions were so he pulled the keys back. (ROA p. 144, line 10 – p. 145, line 18).

Even though the trial court did not have the correct information before it, it held the issue was one of inevitable discovery: "but/for hitting the trunk release button and opening the trunk according to the earlier testimony Mr. Bruce was going to open the trunk for them, or at least was providing the keys to do so." (ROA p. 122, lines 12-16).

The trial court's ruling on this matter was in error. The prosecution bears the burden of showing by a preponderance of the evidence that the items seized would ultimately have been discovered lawfully even though it was obtained by an illegal seizure. Nix v. Williams, 467 U. S. 431, 444, 104 S. Ct. 2501 (1984). The prosecution has not met that burden. See, State v. Brown, 389 S.C. 473, 698 S.E.2d 811, 817 (Ct. App. 2010). The prosecution has also not shown why they could not have obtained a search warrant for the car keys or why they could not have asked for consent in accordance with the Fourth Amendment to the United States Constitution. The trial court

did not even address the fact that the initial seizure of the keys was in violation of the Fourth Amendment.

In the United States v. Allen, 159 F. 3d 832 (4th Cir 1998) the court dealt with the question of whether the existence of probable cause triggers the inevitable discovery doctrine. It wrote:

> The existence of probable cause for a warrant in and of itself and without any evidence that the police would have acted to obtain a warrant, does not trigger the inevitable discovery doctrine any more than probable cause, in and of itself, renders a warrantless search valid. The inevitable discovery doctrine applies to alleviate "formalistic" and "pointless" applications of the exclusionary rule, Nix, 467 U.S. at 445, 104 S. Ct. 2501, but it does not and cannot eliminate Fourth Amendment protections.

159 F. 3d at 841.[1]

Where "no exception to the warrant requirement applies, and no warrant has been obtained, and nothing demonstrates that the police would have obtained a warrant absent the illegal search, the inevitable discovery doctrine has no place." Id at 841 (emphasis in original).

Finally:

> To permit the presence of evidence establishing probable cause to whitewash the unlawful search would eviscerate the warrant requirement. As Judge Posner has noted, "a warrant is a condition precedent to a lawful search or seizure, other than in exceptional circumstances of which superfluity is not one." United States v. Cardona-Rivera, 904 F. 2d 1149, 1155 (7th Cir. 1990).

Id at 843.

All of the evidence obtained as a result of the illegal seizure of the car keys was the fruit of the poisonous tree and should not have been admitted. Wong Sun v. U.S., 371 U. S. 471, 83 S. Ct.

[1] See, also United States v. Cabassa, 62 F. 3d 470, 472 – 474 (2d Cir. 1995) and United States v. Cherry, 759 F.2d 1196, 1206 (5th Cir. 1985) where there was no warrant and the inevitable discovery doctrine did not apply.

407 (1963); State v. Brown, 389 U.S. 473, 698 S.E. 2d 811 (Ct. App. 2010); Commonwealth v. Benoit, 382 Mass. 210, 415 N.E. 2d 818 (1981).

ARGUMENT I

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

The Court of Appeals reasoned that the inevitable discovery doctrine does not come into play until it is first determined if a defendant's Fourth Amendment rights have been violated. The Court went on to note that this case was not the type of case in which the inevitable discovery doctrine is properly applied. The Court wrote:

> In admitting the evidence of the discovery of Creel's body, the trial court stated, "It appears that this is inevitable discovery." The court's statement suggests it admitted the evidence under the inevitable discovery doctrine, which is an exception to the exclusionary rule. State v. Jenkins, 398 S.C. 215, 227, 727 S.E.2d 761, 767 (Ct.App. 2012). However, a trial court has no need to consider whether the exclusionary rule applies until it has first determined the police violated the defendant's Fourth Amendment rights. The record does not indicate the trial court ever made that determination
>
> Moreover, this does not appear to be a situation in which the inevitable discovery doctrine is properly applied. *See State v. Spears*, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct.App. 2011) (stating evidence may be admitted despite a violation of the Fourth Amendment "if the government can prove that the evidence would have been obtained *inevitably*." (emphasis added) (quoting *Nix v. Williams*, 467 U.S. 431, 447, 104 S.Ct. 2501, 2511, 81 L.Ed.2d 377, 389 (1984))). In this case, the State presented no evidence that it would have inevitably discovered Creel's body by some other means had the officers not searched the trunk of her car as they did. Therefore, because the record contains no evidence to support the trial court's statement regarding inevitable discovery and inadequate findings as to the requirement of the doctrine, we may not affirm on that basis.

The Court then went on to say the case should be remanded to determine if petitioner/respondent had a legitimate expectation of privacy in the trunk of the victim's car.

402 S.C. at 626, 741 S.E.2d at 592-593.

It should be noted that 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/respondent and the victim lived. They had lived together for at least 14 years. These facts should be sufficient to establish that petitioner/respondent had a reasonable expectation of privacy. In State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987), the Court held all of the defendants had standing to object to the validity of a search that revealed drugs that were found in a mobile home because the State was attempting to introduce those drugs against the defendants. In State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004), the Court held that a defendant had a reasonable expectation of privacy in his friend's apartment. An overnight guest has a reasonable expectation of privacy in another's home. Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684 (1990). Fourth Amendment protections apply not to just a house, but to property in the curtilage of the home. State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). And in Brendlin v. California, 551 U.S. 249, 127 S.Ct. 2400 (2007), it was held that a passenger in a vehicle had standing a challenge to stop.[2]

More recently, the Supreme Court of the United States has abandoned the reasonable expectation of privacy analysis and has instead held that a vehicle is an "effect" for search or seizure purposes under the Fourth Amendment. In United States v. Jones, __U.S.__, 132 S.Ct. 945 (2012), a GPS tracking device was placed on a vehicle registered to the defendant's wife. The government went after the defendant for conspiracy to distribute and to possess with intent to distribute cocaine and cocaine base. The placing of the GPS device and the monitoring of it constituted a warrantless search under the Fourth Amendment. Cell phones and cell phone data are also now protected from

[2] Respondent/petitioner cites Rakas v. Illinois, 439 U.S. 128, 133-34 (1978) for the proposition that petitioner/respondent had no standing to challenge the search of the victim's car. The cases cited above clearly show that Rakas is no longer good authority.

warrantless searches. Riley v. California, WL 2864483, __S.Ct.__, 2014.

Petitioner/respondent should be protected by the Fourth Amendment under the reasonable expectation of privacy analysis because he lived with the victim for 14 years in the same household and vehicle was on their property in the backyard. He should also be protected because the vehicle is an "effect" under the Fourth Amendment.

The real reason the evidence should be suppressed is that the police seized the keys to the car from inside the apartment without a warrant and without consent.[3] It was this seizure that the Court of Appeals ignores. Anything found as a result of that seizure was the fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963).

[3] The State argues that Mr. Bruce gave consent for the police to take the keys. That is not supported by the record. He only consented to a limited search of the apartment, so the police could see that the victim was not there. The idea that he later gave consent when they were outside by the car is pure speculation.

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.

The Court of Appeals concluded its opinion in this case with the following:

> We remand with instructions that the trial court make findings consistent with this opinion. *See Austin*, 306 S.C. at 19, 490 S.E.2d at 817 (remanding for determination of whether the defendant "had a reasonable expectation of privacy" because trial court failed to make that determination when it admitted evidence pursuant to an exception to the exclusionary rule); *State v. Richburg*, 250 S.C. 451, 461, 158 S.E.2d 769, 773 (1968) (emphasizing the need for specific findings of fact when the legality of a search or seizure is raised); *Jenkins*, 398 S.C. at 230-31, 727 S.E.2d at 769 (remanding issue of whether inevitable discovery doctrine applied). If the court determines Bruce had a legitimate expectation of privacy in the trunk of Creel's car, the police violated Bruce's Fourth Amendment rights by exceeding the scope of his consent, and the evidence should have been suppressed pursuant to the exclusionary rule, the court shall consider whether the error in admitting the evidence was harmless. If the court determines it erred and the error was not harmless, it shall grant a new trial. If the court determines it did not err in admitting the evidence, or the error was harmless, Bruce's conviction must be affirmed.

402 S.C. at 626-627, 741 S.E.2d at 593. (Emphasis added).

This Court has previously ruled that a trial judge is not to sit in judgment of his own decision. Floyd v. State, 303 S.C. 298, 400 S.E.2d 145 (1991) (A judge who presided at petitioner's trial may not preside over a subsequent post-conviction proceeding). 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) (Supreme Court held trial court's error in admitting remote manslaughter convictions of defense witness to impeach his credibility was harmless); Mason v. State, 756 P.2d 612 (Okla. Crim. App. 1988) (The erroneous admission of a prior manslaughter conviction was harmless where the witness was already impeached by other evidence of prior convictions); State v. Salley, 398 S.C. 160, 727 S.E.2d 740 (2012) (Trial court's error in admitting into evidence two pieces of wood that were

found on defendant's trash can outside of her house was harmless); Ex Parte Crymes, 630 So.2d. 125 (Ala. 1993) (Error is admission of victim-impact evidence was harmless error); Driver v. Com., 361 S.W. 3rd 877 (Ky. 2012) (Admission of evidence of defendant's prior assaultive behavior toward his former wife was not harmless error).[4]

In State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct.App. 2012), the court held the error in admitting DNA evidence that was collected pursuant to an invalid warrant was not harmless. Petitioner/respondent would submit the error in the admission of evidence of the victim's body in his case was substantial, was not harmless, and that issue should not be decided by the trial court. It was both essential and critical to the prosecution.

[4] A whole book has been written on this subject by Justice Roger J. Traynor in The Riddle of Harmless Error (Ohio State University Press, 1970).

ARGUMENT III

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.

The Court of Appeals remanded this case so additional findings could be made concerning the search and seizure issue under the Fourth Amendment. It should be noted that the State bears the burden of proof beyond a preponderance of evidence that the police conducted a lawful search and/or seizure. Lego v. Tuomey, 404 U.S. 477, 92 S.Ct. 619 (1972); United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974); Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984). The Court of Appeals wrote that "the State presented no evidence that it would have inevitably discovered Creel's body by some other means had the officers not searched the trunk of her car as they did. Therefore, because the record contains no evidence to support the trial court's statement regarding inevitable discovery and inadequate findings as to the requirements of the doctrine, we may not affirm on that basis." 402 S.C. at 626, 741 S.E.2d at 593. Double jeopardy precludes additional evidence of this issue, as supported by the authorities cited below.

The State also should not be permitted to present any additional evidence concerning what may or may not have been petitioner/respondent's reasonable expectation of privacy in the trunk of Creel's car because the State already had the opportunity to present their evidence. Any attempt to raise additional evidence raises questions of double jeopardy and collateral estoppel. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978) (once the Court of Appeals determined that the Government had failed to rebut petitioner's proof as to insanity, the resolution of factual issues, double jeopardy clause prohibited a second trial); Southern v. State, 371 Md. 93, 807 A.2d 13 (2002) (State was not entitled to a limited remand to introduce new evidence on whether police had probable cause to make initial stop and arrest of defendant); Hopkins v. State, 661 So.2d 774 (Ala.

Crim. App. 1994) (holding that although the record before it left unanswered many questions, that court was not authorized to resolve those questions by remanding for another hearing because the State was presented with an opportunity to establish its case, failed to do so, and under the Double Jeopardy Clause, it does not get a second chance).

The State, like a defendant, gets only one bite. To allow otherwise would be to violate due process of law and the equal administration of justice. Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208 (1973); State v. Hart, 306 S.C. 344, 412 S.E.2d 380 (1991).

CONCLUSION

Petitioner/respondent's conviction should be reversed.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER/RESPONDENT.

This 14th day of July, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE,

RESPONDENT/PETITIONER,

V.

ROGER BRUCE,

PETITIONER/RESPONDENT

APPELLATE CASE NO. 2013-001208

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of July, 2014.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER/RESPONDENT

SWORN TO BEFORE ME this 14th day of July, 2014.

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

412 S.C. 504
Supreme Court of South Carolina.

The STATE, Respondent/Petitioner,
v.
Roger BRUCE, Petitioner/Respondent.

Appellate Case No. 2013-001208.
| No. 27525. | Heard Feb. 4, 2015. | Decided May 27, 2015.

Synopsis

Background: Defendant was convicted in the Circuit Court, Florence County, Thomas A. Russo, J., of murder and was sentenced to life imprisonment. Defendant Appealed. The Court of Appeals, Few, C.J., remanded, 402 S.C. 621, 741 S.E.2d 590. Defendant and State filed petitions for certiorari review, both of which were granted.

Holdings: The Supreme Court, Hearn, J., held that:

[1] it was improper to instruct trial court to consider on remand whether it was error to admit evidence relating to discovery of victim's body and whether error was harmless,

[2] seizure of car keys found on table in defendant's home to open trunk of murder victim's car fell within scope of defendant's consent to police entry of his home to perform welfare check for victim.

Decision of the Court of Appeals reversed; conviction affirmed.

Beatty, J., concurred.

Pleicones, J., concurred in part and dissented in part with opinion.

West Headnotes (12)

[1] **Criminal Law**
Necessity and scope of proof
Criminal Law
Reception and Admissibility of Evidence

A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion.

Cases that cite this headnote

[2] **Criminal Law**
Search and arrest

On review of a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling and will reverse only when there is clear error. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[3] **Criminal Law**
Mandate and proceedings in lower court

It was improper for the Court of Appeals to instruct the trial court to consider on remand whether it was error, in murder prosecution, to admit evidence relating to the discovery of victim's body and whether the error was harmless; trial court could not perform a harmless error analysis of its own evidentiary ruling.

Cases that cite this headnote

[4] **Criminal Law**
Amendment or Correction

Trial courts cannot sit in judgment of their own rulings and proceedings.

Cases that cite this headnote

[5] **Criminal Law**
Prejudice to rights of party as ground of review

The harmless error analysis is an appellate doctrine arising from the principle that appellate courts will not set aside judgments due to insubstantial errors not affecting the result; an appellate court cannot relinquish its responsibility to make this fundamental determination in reviewing an appeal from a criminal conviction.

Cases that cite this headnote

[6] **Searches and Seizures**
Scope and duration of consent; withdrawal

Police officers, who were performing a welfare check for murder victim, acted within the scope of defendant's consent to enter his home when they removed car keys found on a table and used them to open trunk of victim's car, which was parked outside the home and in which victim's body was discovered, and thus seizure of the keys fell within consent exception to warrant and probable cause requirements; defendant was aware that the officers were seeking to determine victim's whereabouts when they requested entry into his home, it was undisputed that defendant allowed the officers into his home, and defendant did not object when one of the officers picked up the car keys, but simply accompanied the officers to the car. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[7] **Criminal Law**
Adding to or changing grounds of objection

Defendant failed to preserve for appeal to the Supreme Court his argument that the search of murder victim's car trunk, in which victim was found, was an unreasonable search, where defendant only argued before the Court of Appeals that the seizure of car keys used to open the trunk was unreasonable. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[8] **Searches and Seizures**
What Constitutes Search or Seizure

A "search" occurs, for purposes of the Fourth Amendment, when an expectation of privacy that society is prepared to consider reasonable is infringed, and a "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[9] **Searches and Seizures**
Necessity of and preference for warrant, and exceptions in general

Searches and seizures without a warrant are per se unreasonable absent a recognized exception. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[10] **Searches and Seizures**
Presumptions and Burden of Proof

The state bears the burden to demonstrate that it was entitled to conduct a search or seizure under an exception to the Fourth Amendment's warrant requirement. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[11] **Searches and Seizures**
Waiver and Consent

One of the exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[12] **Searches and Seizures**
Scope and duration of consent; withdrawal

The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness, that is, what would a typical reasonable person have understood by an exchange between an officer and the suspect. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

Attorneys and Law Firms

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Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General

Brendan J. McDonald, all of Columbia and Solicitor Edgar Lewis Clements, III, of Florence, for respondent/petitioner.

Opinion

Justice HEARN.

Roger Bruce was convicted of murder for the death of his girlfriend, Laura Creel. On appeal, Bruce argued evidence offered at trial relating to the discovery of Creel's body was obtained in violation of his Fourth Amendment rights. The court of appeals found the record was incomplete for appellate review and remanded. *State v. Bruce,* 402 S.C. 621, 741 S.E.2d 590 (Ct.App.2013). We granted both parties' petitions for certiorari. We now reverse the court of appeals' opinion and affirm his conviction.

FACTUAL/PROCEDURAL BACKGROUND

Bruce and Creel were in a romantic relationship and lived together. One evening, Bruce called Creel's son, Shane Ritch, to ask whether he had spoken with Creel. Bruce told Ritch he had not seen her in a couple of days and did not know where she was. Bruce also informed Ritch that Creel's car was still parked outside of their garage apartment. Ritch was concerned because Creel never went anywhere without her car, her phone, and her dog. He immediately called his brother who told him they needed to figure out what happened. Ritch then called the police.

Ritch told the police that neither he nor Bruce had seen Creel in a few days and requested they check on her. He told the police what type of vehicle she drove and that she had left her car, phone, and dog at the house she shared with Bruce, which was uncharacteristic.

Officer Beckett, Officer Starling, and Corporal Hobgood responded to the call. Upon arrival, the officers informed Bruce they were there on a welfare check for Creel and asked if she was inside. Bruce said she was not, and the officers requested permission to look around for her inside. Bruce allowed them inside, and the officers did a quick scan of the rooms. Not finding anything, the officers began to question Bruce, who told them Creel had left after the two argued.

*755 During the conversation, the officers noticed a cell phone and car keys on a table nearby. Bruce informed the officers they both belonged to Creel and Hobgood picked up the keys and went outside to the vehicle. Hobgood looked through the windows into the interior of the car and then attempted to open the trunk, but it would not open. He then asked Bruce which key opened the trunk and Bruce moved toward Hobgood as if to grab the keys. Hobgood pulled the keys back, and Starling pressed the trunk release button. Inside the trunk, the officers discovered Creel's body.

Bruce was subsequently charged with murder and the case proceeded to trial. During the course of Beckett's testimony regarding how the police found Creel's body in the trunk, Bruce objected "to the discovery of the body in this fashion" on the basis that there was no consent and no search warrant was obtained. When the trial court asked what basis Bruce had to object, he responded that it was on his property and the keys were in his house. The solicitor argued it was Creel's car and Bruce therefore had no expectation of privacy. He further claimed Hobgood had testified the previous day that Bruce offered to open the trunk for them. Ultimately, the court denied the motion stating, "[i]t appears that this is inevitable discovery; but/for hitting the release button and opening the trunk according to the earlier testimony Mr. Bruce was gonna [sic] open the trunk for them, or at least was providing the keys to do so."

Bruce was convicted and sentenced to life imprisonment. On appeal, Bruce argued the trial court erred in denying the motion to suppress because Bruce never consented to the officers taking the keys from his home. The court of appeals reversed, finding the record was insufficient for appellate review and remanding with instructions:

> If the court determines Bruce had a legitimate expectation of privacy in the trunk of Creel's car, the police violated Bruce's Fourth Amendment rights by exceeding the scope of his consent, and the evidence should have been suppressed pursuant to the exclusionary rule, the court shall consider whether the error in admitting the evidence was harmless. If the court determines it erred and the error was not harmless, it shall grant a new trial. If the court determines it did not err in admitting the evidence, or the error was harmless, Bruce's conviction must be affirmed.

Bruce, 402 S.C. at 627, 741 S.E.2d at 593. Both the State and Bruce petitioned for certiorari and the Court granted both petitions. [1]

ISSUE PRESENTED

Did the court of appeals err in failing to affirm the trial court's denial of the motion to suppress?

STANDARD OF REVIEW

[1] [2] "A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Mercer,* 381 S.C. 149, 160, 672 S.E.2d 556, 561 (2009). On review of a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling and will reverse only when there is clear error. *State v. Wright,* 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011).

LAW/ANALYSIS

[3] [4] [5] Prior to addressing the legal issue before the Court, we correct the error of the court of appeals' mandate. The court of appeals held the trial court did not provide sufficient findings for appellate review and remanded for consideration of whether Bruce had an expectation of privacy in the trunk of Creel's car and the scope of his consent. The court of appeals further instructed the trial court that if it found the introduction of the evidence was in error, it "shall consider whether the error in admitting the evidence was harmless." *Bruce,* 402 S.C. at 627, 741 S.E.2d at 593. As both parties agree, it is clearly improper for the trial court to perform a harmless error analysis on its own ***756** evidentiary ruling. Trial courts cannot sit in judgment of their own rulings and proceedings. *See Floyd v. State,* 303 S.C. 298, 299, 400 S.E.2d 145, 146 (1991) (adopting, as a matter of policy, a per se rule of recusal that a judge who presided over a defendant's criminal trial cannot preside over a subsequent post-conviction relief proceeding). Furthermore, the harmless error analysis is an appellate doctrine arising from the principle that "appellate courts will not set aside judgments due to insubstantial errors not affecting the result." *Way v. State,* 410 S.C. 377, 384, 764 S.E.2d 701, 705 (2014). The court of appeals cannot relinquish its responsibility to make this fundamental determination in reviewing an appeal from a criminal conviction.

[6] [7] Turning now to the merits, Bruce argues the police violated his Fourth Amendment rights by removing the car keys that were in his home without his consent. [2] We disagree and find the officers' seizure of Creel's car keys from inside Bruce's home was reasonably encompassed within his consent to enter the home and search for Creel. [3]

[8] [9] [10] [11] [12] The Fourth Amendment to the United States Constitution protects a person's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed[and a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). Searches and seizures without a warrant are per se unreasonable absent a recognized exception. *Wright,* 391 S.C. at 442, 706 S.E.2d at 327. The State bears the burden to demonstrate that it was entitled to conduct the search or seizure under an exception to the Fourth Amendment's warrant requirement. *State v. Gamble,* 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013). It is well-settled that one of the "established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness —what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno,* 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991).

The State contends the officers had consent to seize the keys because they were given permission by Bruce to perform a welfare check. We agree. Bruce was aware that the officers were seeking to determine Creel's whereabouts when they requested entry to his home. It is undisputed that Bruce then allowed them in his home. A reasonable person would have understood that this search may extend to looking in her car, which was parked just outside, for any additional insight into where she may have gone or what could have happened to her. Furthermore, our conclusion that the officers acted within the scope of Bruce's consent is supported by Bruce's failure to stop this alleged violation of his constitutional rights. *United States v. Jones,* 356 F.3d 529, 534 (4th Cir.2004) ("[A]

suspect's failure to object (or withdraw his consent) when an officer exceeds limits allegedly set by the suspect is a strong indicator that the search was within the proper bounds of the consent search."). When Hobgood picked up the car keys and walked outside, Bruce did not object but simply accompanied the officers out to the car. We accordingly find no violation of Bruce's Fourth Amendment rights.

*757 CONCLUSION

Based on the foregoing, we find the trial court did not err in denying Bruce's motion to suppress. We therefore reverse the court of appeals and affirm Bruce's conviction.

TOAL, C.J. and KITTREDGE, J., concur.

BEATTY, J., concurring in result only.

PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

Justice PLEICONES.

I concur in part and dissent in part. I agree with the majority that the Court of Appeals' mandate was improper. I dissent, however, from the majority's decision on the merits of the suppression ruling itself, and would reverse the trial court's denial of that motion. Accordingly, I would reverse petitioner-respondent's (Bruce) murder conviction and sentence and remand for a new trial. In order to explain my decision, I find it necessary to review, in detail, both the trial record, the issue on direct appeal, and the petitions for rehearing in the Court of Appeals.

The critical issue, in my view, is the scope of Bruce's consent to search, and I begin with a review of the actual words spoken. An officer testified that "[w]e first asked [Bruce] if we could come inside and take a quick look and make sure that [the victim] wasn't inside, and he gave us permission to come in and take a look." The officer testified the searchers observed car keys "consistent to the [victim's] vehicle outside" and a cell phone on a table, and that another officer "picked up the car keys and went out to the vehicle" with Bruce and the testifying officer following him. The officer testified that the other officer "attempted to open [the car's] trunk," and at that juncture, was interrupted by Bruce's attorney's objection. At the suppression hearing that followed, Bruce's attorney argued "there was no search warrant and no consent to search the vehicle ... they took the keys out of the house [without] permission ... they were just picked up by the police, whisked outside, and the car attempted to be opened at that point." He sought to suppress the body found in the trunk, arguing that the seizure of the keys and the search of the car were beyond the scope of Bruce's consent. The State responded by referencing a different officer's testimony from "yesterday" to the effect that Bruce showed the officer which remote button to use on the key fob to open the trunk. From this representation, the judge ruled that the body would have been inevitably discovered and denied Bruce's motion to suppress.

The record reveals that the only testimony the previous day was taken at the pretrial *Jackson v. Denno*[4] hearing held following Bruce's motion to suppress his oral statements made to police officers. Prior to hearing that motion, the parties agreed that the Fourth Amendment suppression issue would be taken up at trial. Assuming it was proper for the State to reference testimony from the *Jackson v. Denno* hearing at the Fourth Amendment suppression hearing, the officer's testimony at the *Jackson v. Denno* hearing was:

> Q. And did you have opportunity to look in a car?
>
> A. Yes, I did.
>
> Q. And did you have the opportunity to open the trunk?
>
> A. Yes, sir.
>
> Q. Once the remote was activated and the trunk popped open, we discovered that there was a body in the trunk of the car.

In other words, there was no testimony of Bruce's consent to seize the car keys or to search the trunk the "day before" at the *Jackson v. Denno* hearing.

On direct appeal, Bruce's single issue asked whether the trial court erred in denying Bruce's Fourth Amendment suppression motion "when the police took keys to the car from the residence without consent and without a search warrant." The Court of Appeals accurately repeated the scope of Bruce's consent, but then recited the trial testimony of three officers, all of whom testified **after** the suppression ruling. The Court of Appeals ultimately concluded that the circuit *758 court's inevitable discovery ruling was unsupported by evidence and also suffered from "inadequate findings," and remanded the case to circuit court for "findings consistent with [its] opinion."

On rehearing to the Court of Appeals, Bruce reminded the court that his argument went to the seizure of the keys without consent or a warrant, which he contended, rendered the search of the automobile trunk the fruit of the poisonous tree.[5] Further, he argued that the State should not be permitted to introduce new evidence on remand, and that on this record, the denial of his suppression motion was patent error. The State admitted that the solicitor was incorrect in representing that there was evidence of consent at the *Jackson v. Denno* hearing, but argued that the inevitable discovery ruling should have been affirmed because evidence introduced after the suppression hearing supported a finding that Bruce consented to opening the trunk.[6] The Court of Appeals denied the requests for rehearing.

The issue which Bruce has presented throughout these proceedings is whether his consent to a **search** request by law enforcement to "come inside and take a quick look and make sure that [the victim] wasn't inside" was sufficiently broad to permit the officers to **seize** the car keys. In my view, the majority elides this point by finding the scope of Bruce's consent "to come inside" the apartment included consent to search the vehicle's trunk. I cannot agree. *See Walter v. United States,* 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) (consent limited to scope of terms, e.g., consent to search garage does not implicitly authorize search of adjoining house). Further, I cannot agree with the majority that the burden is on the citizen to object to law enforcement's violation of his Fourth Amendment rights rather than on law enforcement to respect them. In *United States v. Jones,* 356 F.3d 529 (4th Cir.2004), the court held that when a defendant "gives his general and unqualified consent for an officer to search a particular area, the officer does not need to return to ask for fresh consent to search a closed container located within that area." *Id.* at 534. Obviously the car trunk was not within the apartment. In my opinion, the majority's reliance on *Jones* is misplaced, especially in light of *United States v. Neely,* 564 F.3d 346 (4th Cir.2009). The *Neely* court held that while silence is indicative that consent extends to item in the area expressly consented to, consent to the search of a car trunk does not include the interior of the car itself. In my opinion, these decisions provide support for Bruce, not the State.

The seizure of the car keys exceeded the scope of Bruce's consent, and there was nothing in evidence to support the trial court's "inevitable discovery" ruling when made, much less to support the consent theory championed on appeal and on certiorari. In my opinion, the trial court erred in failing to grant Bruce's motion to suppress, and nothing in our jurisprudence authorizes a remand to the circuit court to allow the State a "do-over." Further, the State's suggestion that Bruce may lack standing to contest the search of the victim's automobile's trunk ignores his argument. Bruce's Fourth Amendment rights were violated by the unlawful seizure of the car keys from his home.

I agree with the majority that the Court of Appeals erred in its mandate in this case. I respectfully dissent on the merits and would reverse the trial court's denial of Bruce's motion to suppress the body as the fruit of the poisonous tree. I would therefore reverse Bruce's murder conviction and sentence and remand for a new trial. Of course, any evidentiary issue must be decided on the record made at that new proceeding. *See, e.g. State v. Steadman,* 216 S.C. 579, 59 S.E.2d 168 (1950) (at retrial "each party must offer his evidence anew, just as though there had been no previous trial; and when it is so offered it necessarily becomes subject to any legal objection which may be taken to it").

All Citations

412 S.C. 504, 772 S.E.2d 753

Footnotes

1 -- We decide this case with regard to the issue raised in the State's petition and dismiss Bruce's petition for certiorari as improvidently granted.

2 Bruce also alleges the search of the trunk of Creel's car was unreasonable and violated his Fourth Amendment rights. However, Bruce only argued to the court of appeals about the seizure of the car keys; we therefore find any challenge to the subsequent search of the trunk unpreserved. *City of Columbia v. Ervin,* 330 S.C. 516, 520, 500 S.E.2d 483, 485 (1998) (holding an issue not raised by exception to an intermediate appellate court cannot be raised in a subsequent appeal).

3 Given our determination that the officers did not violate Bruce's Fourth Amendment rights, we find it unnecessary to address the State's contention that the evidence would have been inevitably discovered.

4 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

5 *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

6 *See* State's pet. for rehearing at App. p. 15, citing ROA pp. 126–127, 145, 156–158, 168–169.

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