WALLER
LAW GROUP

September 06, 2019

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

Re: Roger Bruce vs. State of South Carolina
C/A No: 2016-CP-21-2266

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Bruce in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: Samuel L. Key, South Carolina Office of Attorney General

Enclosures

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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
D. Craig Brown, Circuit Court Judge

2016-CP-21-2266

Roger Bruce, # 347288,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Roger Bruce, # 347288, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed May 23, 2019 and Order Denying Motion Pursuant to Rule 59(e), SCRCP filed September 3, 2019, issued by the Honorable D. Craig Brown, Presiding Judge, Twelfth Judicial Circuit.

Jonathan D. Waller

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ATTORNEY FOR PETITIONER

September 6, 2019

Other Counsel of Record:
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STATE OF SOUTH CAROLINA
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Appellant,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Samuel L. Key, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to his office located at P.O. Box 11549, Columbia, SC 29211.

Christopher Leventis

September 06, 2019

FORM 4

FILED

2019 MAY 23 PM 4:07

DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP2102266

Roger Bruce	**South Carolina State Of**	
PLAINTIFF(S)	**DEFENDANT(S)**	

Submitted by: **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

5/23/2019

Circuit Court Judge **Judge Code** **Date**

CERTIFIED A TRUE COPY
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

For Clerk of Court Office Use Only

This judgment was entered on **May 23, 2019**, and a copy mailed first class or placed in the appropriate attorney's box on **May 24, 2019**, to attorneys of record or to parties (when appearing pro se) as follows:

Jonathan D Waller 1116 Blanding Street Suite 2B
Columbia, SC 29201

Samuel Leonard Key Rembert C. Dennis Building 1000
Assembly Street Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	)	IN THE COURT OF COMMON PLEAS IN THE TWELFTH JUDICIAL CIRCUIT
Roger Bruce, # 347288, Applicant, v. State of South Carolina, Respondent.	)	Case No: 2016-CP-21-2266 **ORDER OF DISMISSAL**

The matter before the Court is an action for post-conviction relief (PCR). Roger Bruce (Applicant) commenced this PCR action on September 19, 2016. The State made its return on February 6, 2017. The Court held an evidentiary hearing November 6, 2018, at the Florence County Courthouse before the undersigned. Applicant was present and represented by Jonathan D. Waller, Esquire. Assistant Attorney General Samuel Key represented the State. Applicant testified on his own behalf at the PCR hearing. Applicant's trial counsel, Jack Lawson, was deceased at the time of the PCR hearing; however, current Chief Public Defender Scott Floyd, and Investigator Ron Smith of the Public Defender's Office testified at the PCR hearing.

For the reasons discussed below, the Court finds Applicant's allegations are without merit and concludes trial counsel was not ineffective. Therefore, the Court denies relief and dismisses the action with prejudice.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted at the April 2010 term of the Florence County Grand Jury for one count of Murder (2010-GS-21-0254). At trial, Applicant was represented by Jack W. Lawson and Scott P. Floyd, both of the Twelfth

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Circuit Public Defender's Office. Solicitor Edgar L. Clements, III, prosecuted the case. On August 8, 2011, Applicant proceeded to trial before the Honorable Thomas A. Russo and a jury. Applicant was convicted as indicted and sentenced to life imprisonment.

Applicant filed a timely notice of appeal, and the appeal was perfected by Robert M. Pachak of the Office of Appellate Defense. On April 3, 2013, the court of appeals found the trial record was incomplete for appellate review and remanded the case to the circuit court. *State v. Bruce*, 402 S.C. 621, 741 S.E.2d 590 (Ct. App. 2013). However, both Applicant and the State petitioned our Supreme Court for a writ of certiorari, and both petitions were granted. On May 27, 2015, our Supreme Court reversed the court of appeals' decision and affirmed Applicant's conviction. *State v. Bruce*, 412 S.C. 504, 772 S.E.2d 753 (2015). The case was remitted back to the circuit court on June 12, 2015. Applicant then petitioned the United States Supreme Court for a writ of certiorari; however, Applicant's petition was denied on October 5, 2015.

Applicant commenced this PCR action September 19, 2016.

II. FACTS

On October 12, 2009, law enforcement performed a welfare check at a residence occupied by Laura Creel and her boyfriend, Applicant. During the welfare check, law enforcement discovered Creel's body stuffed in the trunk of her car. (Tr. 145–46, 152–53, 163). Applicant was arrested for murdering Creel. (Tr. 441).

The night of the incident, Applicant called Creel's son, Shane Ritch ("Shane"), from Creel's cell phone. (Tr. 124–25). Applicant informed Shane Creel's car was at the residence he shared with Creel; however, Applicant had not seen or heard from Creel "in a couple of days" and was curious whether Shane had heard from her. (Tr. 126). Following his conversation with Applicant, Shane grew concerned and called his brother Michael Ritch ("Michael") who then

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called Applicant. (Tr. 127). Thereafter, Michael, who described his conversation with Applicant as "funny," called Shane to express his concern over the situation. (Tr. 127). As a result of the brothers' second conversation, Shane called law enforcement requesting a welfare check be performed at the residence occupied by Creel and Applicant. (Tr. 127).

Pursuant to this request, Officer Gary Beckett was dispatched to Creel and Applicant's residence, a one bedroom garage apartment. (Tr. 145–47). After knocking on the door for approximately ten minutes and receiving no response, Beckett returned to his patrol car and had dispatch connect him with Shane. (Tr. 146–51). During Shane and Beckett's conversation, Shane informed Beckett Applicant was inside as Shane had called and spoken to Applicant from a landline while he was simultaneously on his cell phone with dispatch. (Tr. 128). Shane further informed Beckett that both he and his brother spoke with Creel almost daily, but neither of them had heard from Creel in three days. (Tr. 152). Additionally, Beckett learned Applicant had a substance abuse problem, the couple had recently been in an argument, and it was unusual for Creel to leave the residence without her cell phone or car. (Tr. 152, 128–29).

In the midst of Shane and Beckett's conversation, Beckett was joined by his supervisor, Charles Hobgood, and an additional patrol officer, Steven Starling, prompting Beckett to end the telephone conversation with Shane in order to brief the officers on the situation. (Tr. 152). After briefing Hobgood and Starling, the three returned to the residence where they saw Applicant looking out of the apartment's screen door. (Tr. 153). At that time, the officers explained to Applicant that they were there to check on Creel and asked Applicant if she was inside. (Tr. 153). In response, Applicant informed the officers that Creel was not inside, but gave the officers permission to "come in and take a look." (Tr. 153). After scanning the residence, the officers asked Applicant when he last saw Creel and if he had any idea where she may be. (Tr. 154).

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Answering the officers, Applicant explained Creel had left him following an argument a few days ago, and he did not know where she was. (Tr. 154).

Over the course of their conversation, the officers observed a cell phone and keys, which were consistent with the vehicle parked outside of the residence, prompting them to ask Applicant who owned the cell phone and keys. (Tr. 155). Applicant explained the cell phone and keys belonged to Creel. (Tr. 155, 85–87, 203–04). Hobgood picked up the car keys and proceeded out to the vehicle in an effort to find "maybe a pocketbook" or something helpful in locating Creel. (Tr. 154, 180). Applicant and the remaining officers followed, and after Hobgood scanned the interior of the vehicle and unsuccessfully attempted to open the trunk, he asked Applicant which key opened the trunk. (Tr. 162, 181, 192–93, 204). Responding to Hobgood's question, Applicant, who was positioned towards the front of the car, "walked towards" Hobgood "with his arm out like he was going to grab the keys" prompting Hobgood to instruct Applicant to tell him which key opened the trunk rather than show him which key opened the trunk. (Tr. 162, 181, 192–93, 204). During this exchange, Starling, who was positioned next to Hobgood behind the trunk, hit the trunk release button on the key fob, opening the trunk. (Tr. 126–27, 146, 169). When the trunk opened, Starling and Hobgood observed Creel's body in the trunk. (Tr. 127–28, 182, 205). At that time, Applicant was handcuffed and later transported for questioning. (Tr. 164–65, 187–90). He was subsequently arrested after telling investigators, who were unaware of what caused Creel's death, "he wouldn't shoot Laura." (Tr. 441).

The trial court held a pretrial *Jackson v. Denno*[1] hearing to decide the admissibility of Applicant's statements to law enforcement. Trial counsel moved to suppress any statements Applicant made to law enforcement for two reasons. (Tr. 40). First, trial counsel moved to supress

[1] 378 U.S. 368 (1964).

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any statements made by Applicant before he was given *Miranda*[2] warnings. (Tr. 40). Second, trial counsel moved to supress any statements given before or after *Miranda* because Applicant was intoxicated when he spoke with law enforcement. (Tr. 40).

At the *Denno* hearing, the State proffered testimony from Carraway (Tr. 42–56); Drayton (Tr. 56–68); Hobgood (Tr. 69–83); and Beckett (Tr. 83–86) regarding Applicant's statements. Carraway stated he was the lead investigator assigned to the case, and he became involved after Creel's body was found. (Tr. 43). Carraway did not speak to Applicant at the crime scene but interviewed Applicant later at the police station with Drayton and Lieutenant James Rogers. (Tr. 43–44, 46). Carraway admitted Applicant was intoxicated at the scene. (Tr. 44). During the interview, Drayton asked Applicant questions and Carraway took notes; apparently, Rogers only observed the interview. (Tr. 46). Carraway stated he did not *Mirandize* Applicant before the interview because Applicant was not under arrest. (Tr. 46). Carraway testified, "[Applicant] was saying that he didn't know what happened and he wouldn't have did anything like that. And [Applicant] then made the statement, I wouldn't have shot [Creel]. He made that statement." (Tr. 48). Carraway further testified, "We hadn't said anything about that because we hadn't been - - we didn't even know what was the cause of death at that time." (Tr. 48). Carraway testified he *Mirandized* Applicant after Applicant made this statement because the officers did not know how Creel died. (Tr. 50–51). After Carraway *Mirandized* Applicant, Applicant invoked his right to remain silent. (Tr. 52). On cross, Carraway testified Applicant was handcuffed, placed in a police car, and told he was being detained after Creel's body was discovered. (Tr. 54).

Drayton testified he supervised the criminal investigation division, and he was Carraway's supervisor on the night the incident occurred. (Tr. 56–57). Drayton testified he spoke with

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

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Applicant the night of the incident and characterized the conversation as "interview status only." (Tr. 57). He testified Applicant was handcuffed for "investigative detention," and the interview took place at the police department. (Tr. 59). Drayton explained Applicant was not *Mirandized* because the interview was "basic interviewing." (Tr. 60). Drayton testified the interview stopped being an interview when Applicant "[admitted] to taking part in the crime . . . ." (Tr. 60–61). At that point, Drayton instructed Carraway to *Mirandize* Applicant; thereafter, the questioning stopped. (Tr. 61–63).

Hobgood testified he was the ranking officer who first made contact with Applicant. (Tr. 70). Hobgood observed Creel's body in the trunk of the car and instructed Beckett to detain Applicant. (Tr. 70). Hobgood stated Applicant was handcuffed and placed in a police car. (Tr. 70–72). On cross, Hobgood admitted Applicant was not free to leave after he was handcuffed and placed in the police car. (Tr. 73). Further, Hobgood testified Applicant was intoxicated but seemed to understand everything going on. (Tr. 73).

Trail counsel moved to supress any statements Applicant made to law enforcement after he was detained. (Tr. 75). Trial counsel argued Applicant was detained when he was handcuffed and placed in the police car because, as Hobgood testified, Applicant was not free to leave. (Tr. 75). The State argued Applicant's statements were admissible because Applicant was not under arrest; rather, he was under investigative detention. (Tr. 76–78). The trial court ruled to allow the statements regarding Applicant's denial of shooting Creel and knowing what a bullet hole looks like. (Tr. 80–83). Trial counsel renewed his objections to the statements during trial. (Tr. 219, 235, 237, 238).

During the State's direct examination of Beckett, trial counsel objected and requested a matter of law be addressed outside the presence of the jury. (Tr. 155). Trial counsel objected to

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the State presenting testimony regarding the discovery of Creel's body because law enforcement did not have a search warrant and Applicant did not consent to law enforcement searching the vehicle. (Tr. 156). The trial court asked, "What standing would he have to object to a search of a vehicle that was not his?" Trial counsel responded the vehicle was on Applicant's property and "the keys [were] in his house." (Tr. 156). The State argued Applicant had no standing, and alternatively argued Applicant did not object to law enforcement opening the trunk. (Tr. 156). Trial counsel further argued, "[Law enforcement] took the keys out of the house. I don't remember [the officers] stating that they asked permission to take the keys. The keys were in the house with him, and they were just picked up by the police, whisked outside, and the car attempted to be opened at that point." (Tr. 157).

The trial court ruled the discovery of Creel's body was admissible based on inevitable discovery stating, "[b]ut/for hitting the trunk release button and opening the trunk according to the earlier testimony [Applicant] was gonna open the trunk for them, or at least was providing the keys to do so." (Tr. 158). After the trial court overruled the objection, trial counsel clarified Creel's body may inevitably have been discovered at a later point, but he was objecting to the entry of any evidence discovered from the time Creel's body was discovered to when her body would have inevitably been discovered with a proper search warrant. (Tr. 158–59). The trial court did not change its ruling.

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III. ISSUES RAISED

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

1. Ineffective Assistance of Counsel
   a. "Contacted no exculpatory witnesses."
   b. "Did not do anything to refute expert testimony."
   c. "Failed to properly prepare for trial, investigate all the elements of the alleged crime, crime scene, and challenge the sufficiency of the indictment."
   d. "Defense counsel failed to: Present a defense; Move to quash the indictment, Question members of the jury on their impartiality." (sic)
2. "Expert Witness Violation"
   a. "Failed to move for court appointed expert assistance to help [counsel] prepare a meaningful defense"
3. "Indictment Violation"
   a. "Trial counsel did not investigate the indictment for murder, which did not have true billed stamped on its face...." (sic)
   b. "There were no Grand jurors (sic) of Florence county (sic) convened on April 1, 2010."
   c. "[T]he indictment does not satisfy the notice requirements of subject matter jurisdiction set forth in the South Carolina constitution and statutes."
4. Due Process
   a. "Jury Tainted Violation"
   b. "Miranda violation"
   c. "Under the influence violation"
   d. "Suppressed statement violation"
   e. Fourth Amendment violation.

At the outset of the PCR hearing, Applicant, through counsel, clarified he was proceeding on the allegations as follows: (1) failure to preserve issues related to the search of Creel's car; (2) failure to challenge and preserve issues regarding Applicant's statements to law enforcement; and (3) failure to object to Officer Carraway's testimony regarding Applicant's prior bad acts. Therefore, to the extent the allegations outlined in Applicant's original application constitute separate issues for relief, this Court finds those allegations are voluntarily waived and abandoned. As such, those allegations are hereby denied and dismissed with prejudice.

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IV. DISCUSSION

The Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. The Court has further had the opportunity to observe each witness who testified at the PCR hearing and judge their credibility. This Court has weighed the testimony and credibility of the witnesses accordingly in its discussion of the issues below. Set forth below are the relevant findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The test for determining if counsel's performance was deficient is "whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel was not deficient and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. There is a strong presumption trial counsel's decisions are based on tactical strategy rather than neglect, and "[t]hat presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.'" *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)). To prove prejudice, the applicant must show "a reasonable

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probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

Applicant asserts trial counsel was deficient for: (1) failure to preserve issues related to the search of Creel's car; (2) failure to challenge and preserve issues regarding Applicant's statements to law enforcement; and (3) failure to object to Officer Carraway's testimony regarding Applicant's prior bad acts. Further, Applicant claims but for trial counsel's alleged errors, the results of his trial or appeal would have been different. As discussed below, the Court finds trial counsel's representation was reasonable under prevailing professional norms, and Applicant has failed to show prejudice resulted from trial counsel's alleged deficiencies. Therefore, the Court denies relief and dismisses this PCR action with prejudice.

1. Failure to preserve issues related to the search of Creel's car for appellate review

Applicant alleges ineffective assistance of trial counsel for failure to properly challenge and preserve the search of Creel's car for appellate review. Applicant does not allege ineffective assistance of appellate counsel.

An issue not raised to or ruled on by the trial court will not be considered on appeal. *State v. Gee*, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974). "Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction." *Id.*

On direct appeal, our Supreme Court summarily dismissed Applicant's argument the search of Creel's car trunk was unreasonable and violated his Fourth Amendment rights for being unpreserved. *See Bruce*, 412 S.C. at 510 n. 2, 772 S.E.2d at 756 n. 2 ("[Applicant] 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."). The Supreme Court found the issue was not

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presented to the court of appeals; therefore, the issue was not preserved for its review. However, the Supreme Court did not dismiss the argument as being unpreserved at the trial level.

As stated above, trial counsel presented this argument to the trial court. Trial counsel moved to supress any evidence relating to Creel's body obtained before getting the search warrant, arguing the evidence was unlawfully obtained in violation of Applicant's Fourth Amendment rights. In essence, trial counsel argued the discovery of Creel's body was the fruit of the poisonous tree. (Tr. 41). Specifically, trial counsel argued, "[Law enforcement] ***took the keys out of the house***. I don't remember [the officers] stating that ***they asked permission to take the keys***. The keys were in the house with him, and ***they were just picked up by the police***, whisked outside, and the car attempted to be opened at that point." (Tr. 157) (emphasis added). After hearing both sides' arguments, the trial court overruled trial counsel's objection and allowed the evidence to be entered based upon the inevitable discovery doctrine. (Tr. 158).

This Court finds trial counsel preserved Applicant's Fourth Amendment argument regarding the seizure of the car keys for appellate review. As emphasized above, trial counsel's argument was premised on law enforcement going beyond the scope of consent to search the house by seizing the car keys and search the car. *See Walter v. U.S.*, 447 U.S. 649, 656 (1980) ("When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization."). The issue was properly raised to the trial court, and the trial court ruled on the issue. Therefore, trial counsel preserved the issue for appellate review. Because trial counsel properly preserved the issue for appellate review, Applicant has shown no deficiency.

Therefore, the Court finds and concludes Applicant did not receive ineffective assistance of trial counsel for failing to preserve Applicant's Fourth Amendment challenge to the seizure of

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the car keys and search of the car for appellate review. The Court denies relief on this allegation and dismisses it with prejudice.

2. Failure to challenge and preserve issues regarding Applicant's statements

Applicant alleges ineffective assistance of counsel for failure to properly challenge and preserve the issue regarding Applicant's statements to law enforcement for appellate review. The Court disagrees.

An issue not raised to or ruled on by the trial court will not be considered on appeal. *Gee*, 262 S.C. at 379, 204 S.E.2d at 729. "Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction." *Id.*

Here, as stated above, trial counsel argued during the pretrial motion hearing Applicant's statements made to law enforcement should have been supressed because the statements were given prior to Applicant receiving *Miranda* warnings. (Tr. 75–76) Following a *Denno* hearing, the trial court made a pretrial ruling to allow Applicant's statements into evidence. (Tr. 83). Trial counsel appropriately renewed his objections to Applicant's statements during trial. (Tr. 219, 235, 237, 238).

The Court finds trial counsel properly preserved the arguments regarding Applicant's statements for appellate review. Trial counsel was not deficient because he properly preserved the issue regarding Applicant's statements for appellate review by raising the issue to the trial court, and the trial court ruled to allow the statements into evidence. Because trial counsel was not deficient in preserving the issue for appeal, Applicant cannot prove ineffectiveness. Therefore, the Court denies relief on this allegation.

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3. Failure to object to Officer Carraway's testimony regarding Applicant's prior bad acts

Applicant alleges trial counsel was ineffective for failing to object to prior bad acts testimony. Specifically, Applicant asserts trial counsel was deficient for failing to object to Carraway's testimony the incident reports he reviewed during his investigation indicated four domestic complaints regarding Creel and Applicant's residence. (Tr. 465). Applicant argues Carraway's testimony implied Applicant had a history of abuse towards Creel, which, in turn, persuaded the jury Applicant murdered Creel. The Court disagrees.

Rule 404(b) of the South Carolina Rules of Evidence Provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). "Nevertheless, this other bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." *State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018). "[I]t is the defendant's duty to raise arguments regarding an improper Rule 403 or 404(b) analysis to the trial court." *Id.* at 199, 818 S.E.2d at 209.

Here, Applicant asserts trial counsel was deficient for failing to object to Carraway's testimony the incident reports he reviewed during his investigation indicated four domestic complaints regarding Creel and Applicant's residence. (Tr. 465). However, a closer review of Carraway's trial testimony is necessary to determine whether trial counsel was deficient for failing to object. On cross, trial counsel asked Carraway:

> Q: And who was Kenny?
> A: Kenny was an old boyfriend that [Creel] had.

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Q: And what's his name?
A: Kenny. That was all I got. That was all I could find.
Q: Did you ever investigate further to find out?
A: Yes. I even went by [Creel's] job to find out who Kenny was. I could never find out who Kenny was.
Q: And so you don't know that his name may have been Kenny Averette?
A: I sure didn't.

(Tr. 459). Trial counsel asked:

Q: So what did you do to find out his last name?
A: I spoke with different people who no one could tell me his last name, and - -
Q: No one could tell you - -
A: No one could tell me his last name, and everyone I spoke with stated [Creel] hadn't been around [Kenny] in a while, a long time.

(Tr. 460). Trial counsel asked Carraway if he checked incident reports regarding the residence. Carraway stated he checked the incident reports but could not find anything. (Tr. 460). Finally, trial counsel asked:

Q: Would you be interested to know whether or not there was a history of violence between Roger and Laura?
A: Yes, I would.
Q: And that's – and so would you then pull up incident reports?
A: Yes, I would.
Q: Did you pull up an incident report involving Kenny?
A: No, I didn't.
Q: Would you be surprised to know that there is one?
A: I really wouldn't be surprised, sir.
Q: If you had pulled that up what do you think it would have revealed?
A: It may have revealed his name. . . .

(Tr. 460–61).

On redirect, the State questioned Carraway about the incident reports Carraway used in his investigation, while Carraway reviewed those reports. (Tr. 464–65). The State asked:

Q: Where on any of those incident reports do you ever see the name Kenny Averette?
A: On none of these.

DCF p. 149/17

Q: What, if anything, on any of those incident reports has anything to do with this incident?
A: Nothing to do with this incident.
Q: Nothing?
A: Oh well, I see a domestic here. I see a harassing threatening complaint on this one, another domestic and another domestic. Four domestics. . . .
Q: There's nothing on a Kenny Averette?
A: Nothing on Kenny Averette.

(Tr. 464–65).

Because trial counsel was deceased by the time the PCR hearing was held and there was no other testimony regarding trial counsel's strategy in this case, the Court must rely on the record in making its determination of this issue. Accordingly, the Court must presume trial counsel acted reasonably in his cross of Carraway and in his failure to object to the subject prior bad act testimony arising during redirect. *See Yarborough*, 540 U.S. at 8 (stating there is a strong presumption that trial counsel's decisions are based on tactical strategy rather than neglect, and "[t]hat presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive'") (quoting *Massaro*, 538 U.S. at 505). Applicant has presented no testimony to rebut the strong presumption trial counsel had a "sound strategic motive" for failing to object to Carraway's brief prior bad act testimony. Further, in reviewing the trial transcript, it is clear trial counsel questioned Carraway on the incident reports to support his defense strategy of third-party guilt. Trial counsel's questioning of Carraway allowed trial counsel to elicit testimony regarding Averette, Creel's ex-boyfriend, which provided evidence in support of his third-party guilt defense strategy. This testimony regarding Averette supported trial counsel's defense strategy as indicated from his closing argument.

DCB
P. 15 9/17

In closing, trial counsel argued, "Now the problem we have in this case is a failure to investigate." (Tr. 499). Trial counsel shunned law enforcement for failing to determine Kenny's last name, even though Creel's son informed law enforcement Kenny threated to kill her two months before her death. (Tr. 499). Trial counsel argued law enforcement's conduct in failing to investigate Kenny was inexcusable neglect and a rush to judgement. (Tr. 499). Further, trial counsel attempted to mitigate the elicited prior bad acts testimony. Trial counsel acknowledged Applicant and Creel would often get into arguments, described their relationship as a "rollercoaster," and "[t]hey'd argue one day and fine the next. But never any physical violence. . . ." (Tr. 502). The Court finds Applicant has failed to overcome the strong presumption trial counsel's failure to object to Carraway's prior bad act testimony was not based on tactical strategy rather than neglect.

The Court finds trial counsel was not deficient for failing to object to Carraway's prior bad acts testimony. Because Applicant has failed to meet his burden of proof regarding the deficiency prong, the Court need not address prejudice. Therefore, the Court denies relief and dismisses this allegation with prejudice.

V. CONCLUSION

Based on all the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief. The Court finds trial counsel's representation was neither deficient nor prejudicial.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR.

DCB 1/6/17

Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

THEREFORE:

1. The Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

AND IT IS SO ORDERED.

D. CRAIG BROWN
Presiding Judge
Twelfth Judicial Circuit

May 23, 2019.

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STATE OF SOUTH CAROLINA COUNTY OF FLORENCE	)	IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT
Roger Bruce, # 347288, Applicant, v. State of South Carolina, Respondent.	)	Case No: 2016-CP-21-2266 **ORDER DENYING MOTION PURSUANT TO RULE 59(e), SCRCP**

The matter before the Court is a motion pursuant to Rule 59(e), SCRCP, from the denial of Roger Bruce's (Applicant) post-conviction relief (PCR) action. Applicant commenced this PCR action on September 19, 2016. The State made its return on February 6, 2017. The Court held an evidentiary hearing November 6, 2018, at the Florence County Courthouse before the undersigned. Applicant was present and represented by Jonathan D. Waller, Esquire. Assistant Attorney General Samuel Key represented the State.

At the PCR hearing, Applicant testified on his own behalf. Applicant's trial counsel, Jack Lawson, was deceased at the time of the PCR hearing; however, current Chief Public Defender Scott Floyd, and Investigator Ron Smith of the Public Defender's Office testified at the PCR hearing. After hearing testimony and arguments from both sides, this Court issued a ruling set forth in its Order of Dismissal filed May 23, 2019. Applicant, through PCR counsel, moved pursuant to Rule 59(e), SCRCP, on June 6, 2019. For the reasons discussed below, this Court denies Applicant's motion.

DISCUSSION

Applicant previously argued to this Court there are two separate Fourth Amendment issues that should have been presented during Applicant's trial. The first, regarding the consent to the seizure of the victim's car keys, was presented to the trial court and on appeal. However, Applicant contends the second argument, whether the use of the seized keys to access the vehicle's trunk exceeded the scope of consent to search the home, was not presented to the trial court, thus, it was not preserved for appellate review. Applicant asserts this Court failed to consider his argument that the search of the victim's vehicle was not preserved for appellate review, and instead based its ruling on the already determined issue related to the seizure of the car keys. The Court disagrees, as this Court's order found and concluded trial counsel presented both arguments to the trial court preserving both issues for appeal.

Applicant is correct this Court did recognize the Supreme Court's footnote indicating the issue of the search of the car was not properly before the Supreme Court on appellate review because the issue was not raised to the Court of Appeals. Applicant is also correct the Supreme Court made no finding as to whether the issue regarding the search of the car was preserved at the trial level, and this Court recognized that notation in its order of dismissal. However, this Court did not stop its discussion of the issue after recognizing the Supreme Court's footnote, rather, this Court went on to find trial counsel properly raised this issue to the trial court and the trial court ruled on the issue. This Court found "trial counsel preserved Applicant's Fourth Amendment argument regarding the seizure of the car keys for appellate review." (Order of Dismissal, p. 11). However, this Court also found trial counsel preserved the issue regarding the search of the car. Specifically, this Court found:

> [T]rial counsel's argument was premised on law enforcement going beyond the scope of consent to search the house by seizing the car keys *and searching the car*. *See Walter v. U.S.*, 447 U.S. 649, 656

> (1980) ("When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization."). The issue was properly raised to the trial court, and the trial court ruled on the issue.

Id. (emphasis added). The above quoted language from this Court's Order of Dismissal is a finding that trial counsel presented both of Applicant's Fourth Amendment arguments to the trial court. Trial counsel's argument was twofold—the seizure of the car keys and the search of the vehicle both went beyond the scope of Applicant's consent to search the home.

The record shows trial counsel argued it "does not appear any consent by [Applicant] [was] given at that time to search the vehicle. I know that he allowed [law enforcement] to come in and look when they asked, but there's no indication that he consented." (Tr. 156). The trial court then interjected and asked, "What standing would [Applicant] have to object to a search of a vehicle that was not his[?]" Trial counsel responded, "It's on his property, and the keys are in his house." *Id.* Trial counsel then also argued the scope of the search was exceeded when law enforcement seized the car keys from inside the house. (Tr. 157). Trial counsel argued Applicant never consented to a search of the car and the seizure of the car keys went beyond the scope of the consent to search the home. The trial court ruled against Applicant's arguments to suppress the evidence because the evidence would have been inevitably discovered. (Tr. 158).

This Court again finds, as it intended in its Order of Dismissal, trial counsel properly preserved both Fourth Amendment arguments for appellate review. Therefore, the Court denies Applicant's motion pursuant to Rule 59(e), SCRCP.

CONCLUSION

Based on the foregoing, Applicant's motion is denied. This Court's ruling was legally correct and supported by the record, and the Court denies Applicant's motion. This Court properly ruled on all issues before it after ample opportunity for Applicant to present his issues. Further,

the Court addressed the issue raised in the motion pursuant to Rule 59(e), SCRCP, to clarify its findings in the Order of Dismissal that both Fourth Amendment arguments were preserved for appellate review. Therefore, the motion is **DENIED**.

AND IT IS SO ORDERED.

D. CRAIG BROWN
Presiding Judge
Twelfth Judicial Circuit

8- 6, 2019.

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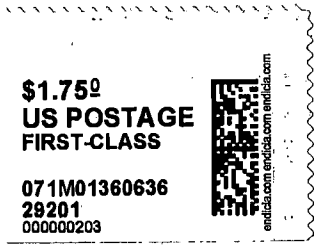

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