RECEIVED
Dec 29 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2022-UP-451 (filed Dec. 14, 2022)

THE STATE,

RESPONDENT,

V.

BRIAN NEIL WHITE,

APPELLANT

APPELLATE CASE NO. 2019-001971

PETITION FOR REHEARING

On December 14, 2022, this Court affirmed Appellant's conviction for murder. State v. White, 2022-UP-451 (S.C. Ct. App. filed Dec. 14, 2022). On appeal, Appellant challenged the trial court's erroneous admission into evidence of phone calls purportedly made by Appellant while he was awaiting trial in pretrial detention. This Court held the phone recordings were admissible under the law enforcement and consent exceptions to the Omnibus Crime Control and Safe Streets Act. Pursuant to Rule 221(a), SCACR, Appellant requests this Court grant rehearing on this matter due to several significant points overlooked and misapprehended by this Court. Specifically, this Court held "the recordings were admissible under the law enforcement exception

because law enforcement monitored [Appellant]'s calls as part of its normal procedure and standard practices." The facts presented to the circuit court showed that law enforcement was not monitoring Appellant's calls as part of any normal procedure or standard practice; rather, the detention center intercepted and recorded Appellant's calls for safety and security, independent of any law enforcement involvement. Further, this Court held "the recordings were admissible because [Appellant] consented to having his calls recorded." Again, the facts presented to the circuit court showed Appellant could not have impliedly consented to the recordings as the alleged warnings were insufficient to justify implied consent.

The Omnibus Crime Control and Safe Streets Act

The United States Congress passed legislation to protect individuals from the unauthorized interception of telephone calls. See 18 U.S.C. § 2511. The law "protects an individual from all forms of wiretapping except when the statute specifically provides otherwise." Abraham v. County of Greenville, 237 F.3d 386, 389 (4th Cir. 2001). Those protections apply to prisoners and pre-trial detainees, like Appellant. See United States v. Faulkner, 439 F.3d 1221, 1222 (10th Cir. 2006) (explaining the protections afforded under Title III apply to prisoners and pretrial detainees); United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002) (same). When information is obtained in violation of the statute, "no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial." 18 U.S.C. § 2515.

Specifically, it is unlawful to "intentionally intercept[] ... or procure[] any other person to intercept ... any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). Additionally, it is unlawful to "intentionally disclose[] ... to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection."

18 U.S.C. § 2511(1)(c). Likewise, it is unlawful to use such ill-gotten communications. 18 U.S.C. § 2511(1)(d).

Law enforcement exception

The statute *exempts* devices used to intercept communications "being used ... by an investigative or law enforcement officer in the ordinary course of his duties." 18 U.S.C. § 2510(5)(a). "'Investigative or law enforcement officer' means any officer ... of a State or political subdivision thereof, who is empowered to conduct investigations of or to make arrest for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses." 18 U.S.C. § 2510(7). See also United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002).

The Fourth Circuit analyzed (1) whether the Bureau of Prisons (BOP) recording of an inmate's phone call with a friend violated the statute, and (2) if the BOP's recording was lawful, whether the FBI's seizure of the recording through a subpoena, rather than court order, violated the statute. United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002). The court first held the BOP's recording of the phone call fell within the "law enforcement" and "consent" exceptions of the statute. Id. Next, the court turned to whether "the FBI's acquisition of the BOP's tapes through subpoena itself constituted an independent 'interception' subject to Title III's requirements." Id. at 192-193. The court concluded that once the recordings were obtained lawfully pursuant to Title III by the BOP, then the BOP was free to do with them as it saw fit. Id. at 193. In other words, "the FBI was free to use the intercepted conversations once they were excepted under either § 2510(5)(a)(1) or § 2511(2)(c)." Id. The court explained that the statute applied only to the initial capture of the communication, and the FBI's conduct was not in using a device to acquire the communication. Id.

Not intercepted by law enforcement for investigative purposes

Here, the local jail used AmTel to provide telephone services to pre-trial detainees. R. 19, ll. 16-20; R. 941. The detention center recorded *all* calls made by pre-trial detainees. R. 36, ll. 19-24. Neither the phone service nor the detention center provided a mechanism for not recording phone calls between attorneys and clients. R. 36, ll. 19-24; R. 38, ll. 12-18. After recording the calls, AmTel provided the recordings to the solicitor's office and law enforcement "almost in real time." R. 19, ll. 21-24; R. 941; R. 31, ll. 14-20; R. 44, ll. 5-13. The detention center allowed immediate access to the solicitor of all recorded detainee phone calls without regard to attorney-client privilege or confidentiality. R. 36, ll. 19-24. In fact, the detention center provided a password to the solicitor's office to use to log on to the phone system, which allowed the solicitor's office to access phone calls made by detainees. R. 42, ll. 3-8. The recording of the phone calls and the use of the recordings of those phone calls violated Appellant's Fourth Amendment rights. R. 21, ll. 8-14; R. 941.

In light of the detention center's policy of recording all calls regardless of confidentiality or privilege, the the solicitors engaged in some self-policing through "a rule in place" that if "the P.D.'s number pops up, nobody listens to it." R. 38, ll. 12-18. As for lawyers outside the public defender office, the solicitors did not listen to those calls either as long as the solicitor knew the number being called wais to a lawyer. R. 38, ll. 19-24. In the past, the solicitor's office had listened to a call between a detainee and a lawyer when the detainee called the lawyer's cell phone, a number with which the solicitor was unfamiliar. R. 38, ll. 19-21. "The minute" the solicitor "realized that it was an attorney," the solicitor turned over the phone call and informed the attorney that the solicitor had stopped listening. R. 38, ll. 21-24.

Regarding the phone calls sought to be admitted here, the solicitor claimed the calls were found by the sheriff's department, who listened to Appellant's phone calls. R. 42, ll. 9-11; R. 952. Importantly, the calls were *not* found by the detention center, which was the entity that intercepted and recorded the calls. The investigator who listened to the calls, made a recording for the police file, which was then turned over to the solicitor for prosecution. R. 43, ll. 3-6; R. 952. In short, the investigator listened to Appellant's phone calls to further his investigation by finding incriminating evidence against Appellant. R. 45, ll. 7-14; R. 952. The recordings made by the investigator were *not* made to ensure security or safety at the detention center. R. 45, ll. 7-14; R. 952.

During the in camera hearing, Investigator Cris Truluck with the Richland County Sheriff's Department elaborated upon the information provided by the solicitor. Truluck obtained two phone calls made by Appellant while he was in the detention center. R. 76, ll. 8-16. Truluck explained how he got the calls:

> [W]hen a defendant gets arrested, he is booked into jail and he's given a ID number. AmTel, which is their phone service, they record all calls. All calls that - - the telephones that are at the jail are marked that the calls are recorded. And prior to the call even beginning, it - - it is a specific line that it's automated that tells you again these calls are recorded.
>
> So - - and we also had that policy at the sheriff's department too. If you use our phones, they're all marked as recorded.
>
> However, normally what you do, you get their ID number that they are given. And you can go to the AmTel website and put in that PIN number or that ID number. And you can set a date - - a - - a time range on it.
>
> Now, as was brought up before, there is a section where you can listen live. But that's a crap shoot. You might get - - click on it and see their name that they are making a live call.
>
> But that's very rare that you can do that. However, that's a possibility. Me personally, I've never done that. I've never been able to do that.

> This process you put down and it - - it lists all the cases and the times that are made. All's you ever have to do is you click on it and you can listen to the call.

R. 76, l. 20 – R. 77, l. 19.

Truluck followed this process when listening to Appellant's phone calls. R. 77, ll. 20-21. He provided two calls to the solicitor. R. 77, ll. 22-24. These calls were part of his investigative file. R. 77, l. 25 – R. 78, l. 2. Listening to calls made by pre-trial detainees was "pretty much standard" practice for the sheriff's department. R. 78, ll. 7-11.

Truluck was *not* employed by the detention center. R. 79, ll. 108. Thus, he was not in charge of any security at the detention center. R. 79, ll. 1-8. His examination of the jail calls was strictly for the sherriff's office's investigative purposes. R. 79, ll. 11-13; R. 79, ll. 20-21; R. 81, ll. 10-15. He never obtained a search warrant in order to listen to jail calls. R. 79, ll. 16-19. Truluck explained that he was listening to Appellant's phone calls "to see if there's investigative leads" revealed in the call. R. 80, ll. 1-3.

Truluck explained there was a "section" showing the person being called by the detainee. R. 80, ll. 21-24. He provided that he had never clicked on the button and learned that the number belonged to an attorney. R. 80, l. 24 – R. 81, l. 3. He was unsure "whether those calls are already screened." R. 81, ll. 4-6. However, he assured the court that he engaged in self-policing, like the solicitor, because he knew "that if [it] does go to the attorney, not to listen to it." R. 81, ll. 8-9.

The state failed to establish the calls at issue were intercepted by law enforcement for investigative purposes. Rather, the calls were intercepted by AmTel, a telephone service provider, in connection with the Alvin S. Glenn Detention Center. There was no evidence presented that Alvin S. Glenn Detention Center was an institution run by law enforcement. In fact, Investigator Truluck, who was employed by the Richland County Sheriff's Department, disavowed any role whatsoever in the managing and operating of the detention center. According to publicly available information, the

detention center is administered by Richland County independent of the sheriff's department. http://www.richlandcountysc.gov/Government/Departments/Public-Safety/Detention-Center.

Neither Truluck nor anyone connected with the Richland County Sheriff's Office intercepted the calls as that term is understood under the Act. Thus, it was incumbent upon the state to show that the person or entity that actually intercepted the call fell within an exception under the law. The state simply failed to do so. See United States v. Lanoue, 71 F.3d 966, 981 (1st Cir. 1995) overruled on other grounds by United States v. Watts, 519 U.S. 148 (1997) (expressing concerns over whether the government could show the phone call was intercepted pursuant to the law enforcement where the phone call was intercepted from a pre-trial detainee at the Wyatt Detention Center, which was owned and operated by Cornell Cox Management, a private corporation). Truluck obtained access to the calls only by grace from the detention center, not pursuant to the law enforcement exception under the Act.

Not consensual

The Act also provides that "[i]t shall not be unlawful ... for a person acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(d); see also 18 U.S.C. § 2515. In short, the Act exempts interception of calls for which there is consent.

Here, the evidence showed there was a warning provided to the participants on the detention center phones. This warning during the phone call was simply that the call was being monitored and recorded. R. 83, ll. 8-20. The recording did not indicate by whom. R. 179, ll. 11-14.

"'Consent' is a broad term and is defined as 'agreement, approval, or permission as to some act or purpose.'" State v. Whitner, 399 S.C. 547, 554, 732 S.E.2d 861, 865 (2012) (quoting Black's Law Dictionary 346 (9th Ed. 2009). "Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 856 (2003). "The state bears the burden of establishing the voluntariness of the consent." Id.

Here, per the actual recording, he was told "all phone calls are subject to monitoring and recording." State's Exhibit #92. Such notice was a far cry from the notice deemed to be sufficient to infer consent by the Fourth Circuit in Hammond, supra. There, the Fourth Circuit explained that inmates "receive two handbooks that state that all calls other than those to their attorneys are monitored. They sign a consent form acknowledging that their calls may be monitored and recorded and that use of the telephones constitutes consent of monitoring." Hammond, 286 F.3d at 191. Further, "[t]hey also receive an orientation lesson plan stating that calls are monitored and are told that such is the case orally during an orientation lesson. Finally, the BOP reminds the inmates that their calls may be monitored by placing notices of monitoring on or near the actual telephones." Id.

Quite simply, the state presented evidence that the only notice Appellant received was that his call was "subject to monitoring and recording" at the beginning of the telephone call that he placed. The minimal warning could hardly satisfy the strictures of consent to waiving one's constitutional right to be free from warrantless searches and seizures. See United States v. Lanoue, 71 F.3d 966, 981 (1st Cir. 1995) ("Deficient notice will almost always defeat a claim of implied consent.").

Conclusion

Appellant respectfully requests rehearing to consider these points that were overlooked or misapprehended by this Court in arriving at its conclusion. The state failed to present evidence that

Appellant's phone calls were being intercepted by law enforcement in order to satisfy the law enforcement exception. The evidence showed the phone calls were intercepted and recorded by non-law enforcement officials. Further, the evidence showed Appellant did not consent to his phone calls being recorded simply by using the phone.

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

This 29th day of December, 2022.

RECEIVED
Dec 29 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2022-UP-451 (filed Dec. 14, 2022)

THE STATE,

RESPONDENT,

V.

BRIAN NEIL WHITE,

APPELLANT

APPELLATE CASE NO. 2019-001971

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the petition for rehearing in the above-referenced case has been served upon Jonathan Scott Matthews, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is smatthews2@scag.gov; and on Brian Neil White, #382851, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 29th day of December, 2022.

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

From:	Stock, Chris
To:	SC - MATTHEWS JONATHAN
Cc:	Hackett, Susan
Subject:	White, B. - Petition for Rehearing - 2019-001971
Date:	Thursday, December 29, 2022 3:14:00 PM
Attachments:	White, B. - Petition for Rehearing - 2019-001971.pdf White, B. - Petition for Rehearing - 2019-001971 - AG Cover Letter.pdf

---

Mr. Matthews,

Please find attached for service the Petition for Rehearing for Brian Neil White's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330