THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY FAMILY COURT

Appellate Case No. 2023-001376

Justin McGee .....Respondent,

v.

Lindsay F. McGee.....Petitioner.

Respondent's Motion to Dismiss

Respondent Justin McGee moves this Court to dismiss these proceedings because the Court lacks jurisdiction to review Petitioner's Amended Motion to Suppress Evidence before consideration by the Charleston County Family Court in the first instance.

Petitioner filed her motion under the South Carolina Homeland Security Act ("the Homeland Security Act"). Yet section 17-30-110 only allows this Court to review a motion to suppress wiretap evidence after a judge of competent jurisdiction (1) receives an application from a qualified individual for an order authorizing or approving the interception of certain communications and (2) issues an order authorizing or approving the interception of such communications. *See* S.C. Code Ann. §§ 17-30-70(A), -80(A)(1), -80(D). The Homeland Security Act is not an independent grant of original jurisdiction to this Court but is instead an establishment of appellate jurisdiction in criminal cases. Because this is a civil case and there was neither an application nor an order for authorization or approval—indeed, Petitioner has not challenged the alleged interception in the Family Court in the first instance—this Court lacks jurisdiction to rule on Petitioner's Amended Motion to Suppress Evidence.

Factual and Procedural Background

Petitioner Lindsay F. McGee and Respondent Justin McGee were married on March 10, 2012. They have three children. The parties last lived together in Charleston County until they separated in May 2022.

The parties tried to amicably resolve their marital issues for several months. Unfortunately, because of Petitioner's adultery, alcohol consumption, and drug abuse, Respondent was compelled to file an action for divorce in October 2022. Respondent moved for temporary relief in May 2023, asking the Family Court's for an order setting a parenting plan and temporary financial relief. Soon after, Petitioner followed suit with a motion for temporary relief of her own.

The next month, Judge Michelle Hurley held a temporary hearing in which each party submitted affidavits and various exhibits to support their requests for temporary relief. Each party noted objections to certain submissions at the outset of the hearing. Petitioner never made an objection even alluding to the Homeland Security Act, nor did she allege Respondent improperly interfered with her communications. On June 15, 2023, the Family Court issued its Temporary Order setting the terms of, among other things, a week-to-week parenting schedule with limitations on Petitioner's ability to associate with certain individuals in the children's presence. The Temporary Order also required the parties to engage in discovery and set a de novo review hearing for September 18, 2023.

Over the past ninety days, the parties have engaged in discovery. Several subpoenas have been issued involving the issues Petitioner raises in the Amended Motion filed with this Court.[1]

[1] Some of these subpoenas are outstanding. For example, Bank of America responded yesterday requesting a 14-day extension to Wife's subpoena for records related to access of certain financial information central to the wiretap allegations. Husband anticipates this subpoena response will likely undermine many of the claims Wife makes in her Amended Motion.

Respondent has moved to compel and contempt actions against Petitioner's witnesses, as well as a motion to quash subpoenas Petitioner has issued involving many of the same issues purportedly before this Court. These issues are set to be heard at the same time as the September 18 de novo review hearing, along with all other discovery or evidentiary issues that have arisen since the issuance of the Temporary Order.

Argument

South Carolina courts must assure themselves of jurisdiction before entertaining the merits of any action. *See Anderson v. Anderson*, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989) ("The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, as is fundamental."); *see also Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 577 (1999) (holding that a "court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits."). Because this Court lacks original jurisdiction over a section 17-30-110 motion to suppress and because the circumstances granting the Court appellate jurisdiction over such motions do not exist in this case, the Court should dismiss these proceedings.

Under the South Carolina Constitution, this Court "shall have such jurisdiction as the General Assembly shall prescribe by general law." S.C. Const. art. V, § 9. General state law provides that the Court "has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit court, family court, a final decision of an agency, a final decision of an administrative law judge, or the final decision of the Workers' Compensation Commission." S.C. Code Ann. § 14-8-200(a). These two authorities make no provision for the Court to entertain this action in its original jurisdiction.

Although Petitioner suggests this Court has original jurisdiction over civil wiretap suppression motions and goes so far as to ask the Court to make detailed factual findings, she cites

no constitutional provision, statute, or court rule providing this Court with that jurisdiction. For example, the Supreme Court's jurisdiction in our Constitution specifically references that court's ability to issue *original* writs. *See* S.C. Const. art. V, § 5; *see also* S.C. Code Ann. § 14-3-310 (referencing the Supreme Court's original jurisdiction). A court rule similarly provides for original proceedings, but only in the Supreme Court. Rule 245, SCACR. Respondent knows of no such similar grant of original jurisdiction to this Court. In fact, state law makes clear that this Court's jurisdiction "is appellate only" and is not original (unlike the jurisdiction statutorily granted to the Supreme Court in some cases). S.C. Code Ann. § 14-8-200(a). The distinction between the two courts' jurisdiction makes sense, given that original jurisdiction in an appellate court is generally reserved for matters addressing novel issues of significant public interest, *see, e.g.*, *Laffitte v. Bridgestone Corp*., 381 S.C. 460, 464, 674 S.E.2d 154, 156–57 (2009), and given the general rule that our Supreme Court will not entertain matters of original jurisdiction when the matter can be addressed by a trial court in the first instance, *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991).

The Homeland Security Act also does not expand this Court's appellate jurisdiction. Passed in 2002 and placed in Title 17 (Criminal Procedures), section 17-30-110 establishes the requirements for moving to suppress under the Homeland Security Act: "Prior to any trial, hearing, or proceeding in or before any court, . . . any aggrieved person may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, on the grounds that the . . . communication was unlawfully intercepted[.]" S.C. Code Ann. § 17-30-110(A)(1). The motion to suppress "must be made before the reviewing authority[2] and must be

[2] The Homeland Security Act defines "[r]eviewing authority" to mean "a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals." S.C. Code Ann. § 17-30-15(9).

decided on an expedited basis." *Id.* § 17-30-110(A). "Upon receiving the motion, the reviewing authority must notify the issuing judge who must transfer copies of the contents of all recordings, applications, orders, and other documents relating to the issuance of the order of authorization." *Id.* "After reviewing the materials, the reviewing authority must first determine whether all materials otherwise discoverable under South Carolina law were made available to the aggrieved person." *Id.* If a majority of the reviewing authority "determine[s] that all necessary materials were made available, the reviewing authority must decide whether the order of authorization was issued and the communications were intercepted in conformity with the requirements of this chapter." *Id.*

The circumstances underlying Petitioner's Amended Motion to Suppress Evidence fall outside the review contemplated by section 17-30-110 and should be dismissed for two reasons.

First, the phrase "reviewing authority" implies there must be an order for this Court to review in the first instance. *See* S.C. Code Ann. § 14-8-200(a) (providing the Court of Appeals' jurisdiction "is appellate only"); S.C. Code Ann. § 17-30-110(B) (explaining that although the Court of Appeals en banc has initial appellate jurisdiction over the State's appeal of an order granting a motion to suppress, "[a]ll other appellate procedures remain in force and effect"). Section 17-30-110 consistently references the Court's authority to determine whether "the order of authorization or approval" complied with the Homeland Security Act. The requirements for obtaining such an order are set forth in sections 17-30-70 and -80. An application for the order "must be initiated by the Chief of [the South Carolina Law Enforcement Division (SLED),]" reviewed by "the Attorney General or his designated Assistant Attorney General[,]" and submitted "to a judge of competent jurisdiction . . . ." S.C. Code Ann. § 17-30-70(A); *see id.* § 17-30-80(A)(1). Upon application, the judge may grant "an order authorizing or approving the

interception of wire, oral, or electronic communications" by SLED or an individual contracted by SLED to investigate certain offenses. *Id.* §§ 17-30-70(A)(1)-(3); *see id.* 17-30-80(D). In this case, there is neither an application nor an order addressing the admissibility of the evidence within the jurisdictional parameters of section 17-30-110. Thus, there is nothing for this Court to review.[3]

Second, section 17-30-110 indicates suppression is an appropriate remedy only in cases involving interception by a State agent or employee. This interpretation is bolstered by several factors. As noted above, Title 17—which encompasses the Homeland Security Act—is entitled "Criminal Procedures." Although the Homeland Security Act references civil actions for wrongful interceptions in one section, there are no references to civil liability in section 17-30-110. *See* S.C. Code Ann. § 17-30-135; *see also, e.g.*, *State v. Bixby*, 388 S.C. 528, 548–49, 698 S.E.2d 572, 583 (2010); *State v. Guerrero-Flores*, 402 S.C. 540, 534, 741 S.E.2d 577, 580 (Ct. App. 2013). Even in its references to appellate review, section 17-30-110 only guarantees *the State* a right to appeal orders of authorization or approval and orders granting a motion to suppress. *See* S.C. Code Ann. § 17-30-110(B) ("*The State* has the right to appeal an order granting a motion to suppress made under subsection (A)." (emphasis added)); *id.* § 17-30-110(C) ("*The State* has the right to appeal the denial of the application of an order of authorization or approval. The appeal must be directed to the reviewing authority and must be conducted in a manner consistent with subsection (A)." (emphasis added)). This limitation suggests suppression is only available in cases involving a State interceptor, which Respondent certainly was not.

[3] Petitioner's Amended Motion is inconsistent on this point. In one breath, she asks for this Court to make detailed findings of fact in the first instance. (*See* Am. Mot. to Suppress Evidence at 1.) Yet she styles her Motion and Amended Motion as being an "appeal" from Charleston County Family Court. (*Id.*) To be clear: there has been no ruling by the family Court for this Court to review because Petitioner has made no objection under the Homeland Security Act below.

The Supreme Court's decision in *State v. Whitner*, 399 S.C. 547, 732 S.E.2d 861 (2012), does not demand a different result. *Whitner* confirms that the Homeland Security Act "parallels" the Wire and Electronic Communications Interception and Interception of Oral Communications Act ("the Federal Act"). *Id.* at 553, 732 S.E.2d at 864. The Federal Act imposes similar limitations on the scope of a motion to suppress and the federal government's right to appellate review. *See* 18 U.S.C. § 2518(1), (10)(a) (permitting a motion to suppress "the contents of any wire or oral communication intercepted" pursuant to an order of authorization or approval obtained from "a judge of competent jurisdiction" by an "investigative or law enforcement officer"); *id.* § 2518(10)(b) ("In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay."). Unlike the Homeland Security Act, however, the Federal Act allows a judge of competent jurisdiction—defined to include "a judge of a United States district court or a United States court of appeals"—to both issue the order of authorization or approval and rule on the motion to suppress. *See id.* §§ 2510(9), 2518(1).

Conversely, the Homeland Security Act imposes a two-step process during which (1) a judge of competent jurisdiction must issue an order of approval and authorization and (2) the reviewing authority must separately review a motion to suppress evidence obtained as a result of the order of approval and authorization. That process did not occur in this case. Moreover, *Whitner* is factually distinguishable because it arose from a criminal prosecution, which more squarely falls under the criminal procedure provisions of Title 17. For that reason, it makes sense the *Whitner* Court noted, in dicta, that this Court previously conducted a suppression hearing to

address the petitioner's challenges to the State's interception of the disputed call recording. *Whitner*, 399 S.C. at 551, 732 S.E.2d at 863. Again, those circumstances are not before this Court, as the underlying action here is a family court divorce proceeding.

Therefore, this Court lacks jurisdiction to rule on Petitioner's Amended Motion to Suppress Evidence.

Conclusion

Respondent vehemently denies the allegations set forth in Petitioner's Amended Motion. But the proper forum for addressing the merits of those allegations is the Charleston County Family Court, not this Court. Because Petitioner cannot establish a basis for this Court's jurisdiction other than her strained interpretation of section 17-30-110, the Court should dismiss Petitioner's Amended Motion to Suppress Evidence. If the Court denies Respondent's Motion to Dismiss, Respondent alternatively asks the Court to grant his separately filed Motion for Extension of Time to File Return to Petitioner's Amended Motion to Suppress Evidence.

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Proof of Service

I, the undersigned partner of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Petitioner Academy, Ltd. d/b/a Academy Sports + Outdoors, certify that I have served all parties in this action with a copy of the document(s) set forth below by email:

Document(s): **Respondent's Motion to Dismiss**

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From: Matt Abee
Sent: Friday, September 8, 2023 2:59 PM
To: 'pete@mscmlaw.com'
Cc: 'lizzie@mscmlaw.com'; 'Jerry@Theoslaw.com'; 'Brittany Point'; 'Jackie'; 'ml@ramsdalelaw.com'; 'Lori Ross'
Subject: Service Copy - Motion to Dismiss and Motion for an Extension - McGee v. McGee (No. 2023-001376) - 079821.01501
Attachments: Respondent's Motion to Dismiss - McGee (2023-001376).pdf; Respondent's Motion for Extension to File Return - McGee (2023-001376).pdf; Proof of Service - McGee (Motion to Dismiss).pdf; Proof of Service - McGee (Extension Motion).pdf

Pete,

For service on you by email under Supreme Court Order No. 2022-05-06-03, please find Respondent's Motion to Dismiss, Motion for an Extension, and Proofs of Service.

Please feel free to contact me should you have any questions. Thanks.
-Matt

Please note that I will be out of the country September 22 through October 6, 2023.

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