

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL JURISDICTION OF THE COURT OF APPEALS

Indictment Nos.: 2013-GS-40-04051 and 04052

STATE OF SOUTH CAROLINA, Respondent,

v.

RYAN BRADFORD KIRBY, Petitioner.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR HEARING

NOW comes the Petitioner, by undersigned counsel, and offers the following Memorandum of Law in Support of Petitioner's Petition for Hearing:

On October 9, 2013, Petitioner filed with this honorable Court Notice of Motion and Motion to Suppress, Memorandum of Law in Support of Motion to Suppress along with the Order of the Honorable Alison Renee Lee, Presiding Judge for the Court of General Sessions for the Fifth Judicial Circuit, dated September 26, 2013. This honorable Court, on October 21, 2013, issued an Order denying Petitioner's said Motion. Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Petitioner hereby petitions this honorable Court for a hearing.

The Petitioner's Motion to Suppress the electronic recording claims his constitutional rights as protected by the 4th and 5th Amendments were violated. Therefore, Petitioner has been denied an opportunity to articulate specific factual and legal grounds to support his contention that the evidence he seeks to suppress was obtained by conduct which violated his above-mentioned constitutional rights. See *State v. Blasingame*, 244 SE 2d 428 (1978) and *State v. Patton*, 472 SE 2d 245 (1996).

The trial court failed to provide Petitioner with a due process evidentiary hearing on his constitutional claims. "Procedural due process requires 'adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine witnesses, and the right to meaningful judicial review.'" *State v. Dukes*, 404, S.C. 553, 745 S.E.2d 137, 140 (2013) quoting *Dangerfield v. State*, 376, S.C. 176, 656 S.E.2d 352, 354 (2003). Moreover, in its Order of October 21, 2013, this honorable Court emphatically declined to address Petitioner's constitutional grounds as raised in his Motion to Suppress. Said Order reads, in pertinent part:

... We decline to address Petitioner's constitutional grounds as well as those based on Rule 403, SR+SCRE. See S.C. Code Ann. § 17-30-110(A) (Supp. 2012) (noting this Court's jurisdiction under the Wiretap Act is to "decide whether the order of authorization was issued and the communications were intercepted in conformity with the requirements of this chapter).

This honorable Court conducted a review of the Petitioner's Motion to Suppress and Memorandum in Support, dated October 9, 2013, along with the Order of Judge Lee, dated September 26, 2013. However, Judge Lee's Order did not address the merits of Petitioner's Motion to Suppress. Instead, Judge Lee ruled the trial court lacked subject matter jurisdiction; and, the South Carolina Appellate Court is the reviewing authority

pursuant to the South Carolina Homeland Security Act codified at S.C. Code Ann § 17-30-10 to which we disagree.

This honorable Court did not request (i) records from the lower court in this case—Criminal Records Division, Office of the Richland County Clerk of Court [see Exhibit A attached hereto]; (ii) copy of the transcript from the Court Reporter of the motion hearing in the Court of General Sessions before Judge Lee. [See Exhibit B attached hereto]; (iii) the “CD of phone call” included in the States’s Discovery; or, (iv) the State to file any response. In accordance with [i] above, pursuant to § 17-30-110(A) of the S.C. Code of Laws, “the reviewing authority must notify the issuing judge who must then transfer copies of the contents of all recordings, applications, orders, and other documents relating to the issuance of the order of authorization.”

Petitioner is entitled to a due process hearing on his Motion to Suppress the electronic recording and the burden would be on the State to prove the victim voluntarily consented or had the capacity to consent to law enforcement electronically recording the conversation in question. See William Eugene Carter v. State of Maryland:

Accused, who moved for suppression of property seized pursuant to search and seizure warrant, was entitled to evidentiary hearing to determine whether any wiretapping or electronic eavesdropping was conducted in violation of his rights under Fourth Amendment; he had to be given opportunity to show that facts sworn to in affidavit as a basis for probable cause were obtained either directly or derivatively as an exploitation of any such illegal wiretapping or eavesdropping.

William Eugene Carter v. State of Maryland, 274 Md. 411, 337 A.2d 415 (1975).

This honorable Court erroneously concluded in its Order of October 21, 2013 that the “. . . taping. . . .” The record is clear as reiterated in Judge Lee’s Order of September 26, 2013 the telephone call was recorded. In order to “tap” a phone line, law

enforcement would be required to obtain a Court Order. This honorable Court reiterated in its Order of October 21, 2013, "... 'decide whether the order of authorization was issued and the communications were intercepted in conformity with the requirements of this chapter.'" It is clear there is no such Order for taping in this case.

This honorable Court also seems to conclude that § 17-30-30 requires only the consent of the alleged victim. Prima facie compliance with § 17-30-30 does not redeem the State here because a deeper analysis reveals constitutional violations. Therefore, a hearing would allow Petitioner an opportunity to show the alleged victim acted as State's agent "under color of law." Petitioner invites the Court to compare the South Carolina Code section to the federal counterpart, 18 U.S.C.A. §2511(d):

(d) It shall not be unlawful under this chapter for a person **not acting under color of law** to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state..

8 U.S.C.A. §2511(2)(d). [Emphasis added.]

The State does not deny that the alleged victim acted as its agent, nor does it deny that the call was scripted by the State. Neither the South Carolina nor the federal statute authorizes a State agent to be the consenting party for purposes of intercepting electronic communications. The State ignores the constitutional mandates it violated when its agent used the State's scripted questions to coerce self-incriminatory statements from the Respondent, which it, then, intercepted. For this reason, a due process hearing is required.

Petitioner asserts a cursory dismissal of his Motion to Suppress violates his Fourth Amendment rights. As set forth in *Katz v. United States*, 389 U.S. 347, 359, 88 S.Ct. 507, 515 (1967) "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." In this case, as in the *Katz* case, "government agents here ignored 'the procedure of antecedent justification. . . that is central to the Fourth Amendment.'" *Id.* Petitioner contends the manner by which the conversation was intercepted was duplicitous in that Respondent manipulated the alleged victim in order to attempt to get self-incriminating statements by the Petitioner. Petitioner further contends his filing of a Motion to Suppress on grounds of Fourth Amendment violations requires first a determination "whether the defendant has a legitimate expectation of privacy" then a decision as to "whether the police violated his Fourth Amendment rights." *State v. Bruce*, 402 S.C. 621,624, 741 S.E.2d 590 (2013).

Conclusion

The Petitioner respectfully request that this honorable Court reconsider its Order of October 21, 2013; and, grant a hearing on Petitioner's Motion to Suppress.

By: 

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ATTORNEYS FOR PETITIONER

November 4, 2013.

Subject: RE: State v. Ryan Kirby (Docket No. 2013-GS-40-04051 and 04052)
From: Harris, Elizabeth B. (EHarris@sccourts.org)
To: hppride@bellsouth.net
Date: Monday, October 28, 2013 1:36 PM

No. I haven't received an order from anyone.

From: H.P. PRIDE [hppride@bellsouth.net]
Sent: Monday, October 28, 2013 12:17 PM
To: Harris, Elizabeth B.
Subject: Re: State v. Ryan Kirby (Docket No. 2013-GS-40-04051 and 04052)

Did the Court of Appeals order the transcript from the case of State v. Ryan Kirby before Judge Lee.



Subject: RE: State v. Ryan Kirby (Indictment Nos. 2013-GS-40-04051 & 04052)
From: TERESA CRIBB (CRIBBT@rcgov.us)
To: hppride@bellsouth.net;
Cc: MCBRIDEJ@rcgov.us;
Date: Tuesday, October 29, 2013 4:35 PM

We have no request in our incoming mail that we could find for this file. It is pending. Our file is public record so anyone can come get a copy of the file and pay for it, so we may not have a mail request. Hope this helps.

Teresa T. Cribb

Richland County Clerk of Court

Criminal Records Manager

PO Box 2766

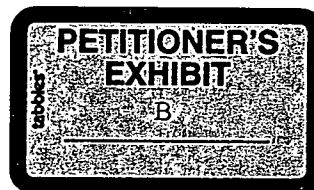
Columbia SC 29201

803-576-1936 cribbt@rcgov.us

From: H.P. PRIDE [mailto:hppride@bellsouth.net]
Sent: Tuesday, October 29, 2013 9:51 AM
To: TERESA CRIBB
Cc: JEANETTE MCBRIDE
Subject: State v. Ryan Kirby (Indictment Nos. 2013-GS-40-04051 & 04052)

SECOND REQUEST.

From: H.P. PRIDE <hppride@bellsouth.net>
To: "mcbridej@rcgov.US" <mcbridej@rcgov.US>
Sent: Monday, October 28, 2013 12:38 PM
Subject: State v. Ryan Kirby



Ms. Cribb:

On yesterday, October 28, a request was made "To Criminal Records in the Clerk's Office" for

<http://us-mg206.mail.yahoo.com/neo/launch?.partner=sbc&.rand=1atci30gmm8pm>

10/30/2013

an "... e-mail verifying [whether] the SC Court of Appeals requested records from [the Office of the Clerk]" in the case of *Ryan Kirby*. Through inadvertence, the request was sent via e-mail to the Honorable Jeanette McBride instead of your e-mail address.

Your consideration in providing this information is appreciated.

