

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
STATE OF SOUTH CAROLINA)
)
)
-v-)
)
RYAN BRADFORD KIRBY,)
)
Petitioner)

IN THE COURT OF APPEALS

**STATE'S RESPONSE TO PETITION
FOR REHEARING**

APPELLATE CASE #: 2013-002145

INDICTMENT #:
2013-GS-40-04051 & 04052

RECEIVED
DEC 02 2013
SC Court of Appeals

The undersigned counsel for the State of South Carolina hereby moves this Court to deny the Petition for Rehearing on the Court's denial of his Motion to Suppress. Petitioner's Motion to Suppress challenged statements made by the Petitioner during a phone conversation between the Petitioner and victim, which was recorded with consent of the victim.

RECORDING AUTHORIZED BY 17-30-110(1)

The Petitioner states in the first page and again in his third page of his MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO SUPPRESS, that the recording at issue in this case was a "February 28, 2013 telephone conversation initiated by the alleged victim and at the behest of the Respondent." EXHIBIT C of the Petitioner's MEMORANDUM represents the underlying facts as follows: "Inv. Holdorf and I met with Ashley Jones and her mother at HQ. Ashley called Ryan and the phone went to voicemail. A few minutes later Ryan Kirby called back and Ashley answered." Petitioner's EXHIBIT C goes on to give a very brief summary of the phone conversation that took place between the victim and the Petitioner, Ryan Kirby. It is then noted that after Ashley's phone goes dead, the phone call was downloaded off the recorder and Ashley was allowed to take the recorder with her in case the Petitioner called back after

she charged her phone. EXHIBIT C, MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS.

This was a lawful interception authorized under Title 17 which allows interception where one of the parties to the communication has given prior consent to the interception. See §17-30-30 (B) and (C). The South Carolina Wiretap Statute was passed as part of the Homeland Security Act in 2002. See S.C.Code Ann. §§ 17-30-10 et seq; South Carolina Homeland Security Act, 2002 Act No. 339. In writing the statute, the South Carolina General Assembly included a “consent exception” to the general rule prohibiting **third parties** from intercepting conversations between other individuals. This consent exception parallels the Federal Wiretap Statute’s consent exception in that they both proscribe third parties from intercepting a conversation unless one of the parties to the communication has given prior consent. Compare S.C. Code Ann. § 17-30-30 with 18 U.S.C. § 2511 (2) (d).

**NO ALLEGATION THAT VICTIM’S CONSENT WAS INDUCED BY DECEIT,
TRICKERY OR MISREPRESENTATION**

Petitioner asserts that the State engaged in deceit, trickery and misrepresentation in its involvement in the recording of the phone call. First, we agree with this Court’s Order denying his Motion to Suppress that the plain language of the Wiretap Act does not include any exception to the general admissibility of an electronic communication where one party has consented, citing to *State v. Whitner*, 399 S.C. 547, 553, 732 S.E.2d 861, 864 (2012). Second, the facts provided by the Petitioner in his MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS only assert that the victim made false statements to the Petitioner during the phone call. Petitioner never makes any factual allegation that the State engaged in any deceit, trickery or misrepresentations to the victim in order to obtain her consent to make the phone call to the Petitioner.

FOURTH AND FIFTH AMENDMENT VIOLATIONS AND RULE 403

The Petitioner's grounds for suppression of the Petitioner's statements pursuant to the Fourth and Fifth Amendments of the United States Constitution and Rule 403 SCRE, should be addressed by the trial court. These arguments are not within the function of the Court of Appeals when challenging a recorded phone call pursuant to S.C. Code Ann. § 17-30-110(A).

IN CONCLUSION

The State respectfully requests that this Court deny the Petition for Rehearing and remand to the trial court for trial.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

PRETRIAL FROM RICHLAND COUNTY
Court of General Sessions

Indictment No. 2011-GS-40-2059


STATE OF SOUTH CAROLINA,
RESPONDENT

V.
RYAN KIRBY,
PETITIONER

PROOF OF SERVICE

I, Margaret Fent Bodman, certify that I have Served the State's Response to Petitioner's Request for Rehearing depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

HEMPHILL P. PRIDE
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Margaret Fent Bodman
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Fifth Judicial Circuit

December 2, 2013
Columbia, South Carolina