

STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of General Sessions
Alison Renee Lee, Presiding Judge
Indictment Nos 2013-GS-40-04051 and 04052

S.C. Supreme Court

Opinion No 2013-002145 (S C Ct App filed Oct. 21, 2013)

STATE OF SOUTH CAROLINA Respondent,
vs
RYAN BRADFORD KIRBY Petitioner

PETITION FOR WRIT OF CERTIORARI

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SC Court of Appeals

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for a Rehearing was made and finally ruled on by the Court of Appeals on December 4, 2013, and the Motion for Reinstatement was made and finally ruled on by the Court of Appeals on February 4, 2014

QUESTIONS PRESENTED

- 1 The Court of Appeals should have suppressed the February 28, 2013, recording of the conversation between Ashley Jones and Ryan Kirby because the South Carolina Wiretap Act is unconstitutional on its face and as applied in this case

STATEMENT OF THE CASE

On January 30, 2013, Ashley Jones was admitted to Palmetto Baptist Hospital Behavioral Program with an admission and discharge diagnosis of major depression and post traumatic stress disorder [App 14, Copy of Discharge Summary attached to Petitioner's Reply to State's Response to Petition for Rehearing as Exhibit B]¹ The

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- 1 Ashley Jones' medical records show that she had significant mental and emotional issues during the period relevant to the police investigation
 - a From January 30, 2013, through February 7, 2013, the alleged victim was an in-patient at Palmetto Health Baptist Behavioral And, as further documented in this report, Dr Timothy Malone diagnosed the alleged victim at the date of discharge with major depression, and, post-traumatic stress disorder The alleged victim was discharged on February 7, 2013, with the following medications Klonopin 0.5 3 times daily, Pristiq 100 mg daily, and Trazodone 50 mg at bedtime She was further instructed to follow-up with the Baptist Partial Day Program and Post Traumatic Resources [See copy of Medical Record attached as Exhibit C to Memorandum of Law in Support of Motion to Suppress]
 - b On February 5, 2013, Investigator Wagner interviewed the alleged victim, and, on said date, the alleged victim was in the in-patient program at Palmetto Health Baptist Behavioral [See copy of Medical Record attached as Exhibit D to Memorandum of Law in Support of Motion to Suppress]
 - c The alleged victim has reported struggling with her sexual orientation as well as has a past history of smoking marijuana [See copy of Medical Record attached as Exhibit E to Memorandum of Law in Support of Motion to Suppress]

Discharge Summary indicates that Ashley Jones stated that she had been sexually molested by Ryan Kirby and her brother approximately fifteen years earlier. The alleged sexual abuse was, in turn, reported to law enforcement, as required by law.

On February 28, 2013, Officer Holly Wagner and Inv. Travis Holdorf met with Ashley Jones and her mother at Richland County Sheriff's Department Headquarters. [App. 2, Defendant's Memorandum of Law in Support of Motion to Suppress, Exhibit A] A recording device was attached to Ashley Jones' cell phone and she, then, called Ryan Kirby on his cell phone. Following a script provided by Officer Wagner and Inv. Holdorf, Ashley asked Ryan to talk to her about an alleged prior relationship between Ashley and Ryan when both parties were under the age of 14. [App. 2, Defendant's Memorandum of Law in Support of Motion to Suppress, Exhibit B] Upon instruction to do so by the Respondent, the alleged victim stated, among other things, "I just want closure", "I just want to know why", "I want to move on", "I'm looking for an apology", "[m]y therapist said this would help", "This is hard on me", "[t]hat is my nightmare", "I see it every day", and other statements specifically scripted by the Respondent. [App. 7, Petitioner's Memorandum of Law in Support of Motion to Suppress, Exhibit D, Transcript of February 28, 2013 phone call]

Petitioner repeatedly asked Ashley if the conversation was being recorded, who was with Ashley, where was Ashley located, and stated that they should be talking in person in private. [App. 7, Petitioner's Memorandum of Law in Support of Motion to Suppress, Exhibit D, p. 2, lines 18-25] Ashley denied recording the call, failed to disclose the presence of the investigators, and, stated that she only wanted closure, an explanation and

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- d. On October 12, 2012, the alleged victim states she had marijuana two weeks prior. [See copy of Medical Record attached as Exhibit F Memorandum of Law in Support of Motion to Suppress.]
 - e. The alleged victim also has a medical history of seizures. [See copy of Medical Record attached as Exhibit G Memorandum of Law in Support of Motion to Suppress.]

an apology Id , p 2, lines 18-25 Eventually, Petitioner apologized for hurting Ashley, but the exact nature of the alleged wrongful acts was not described in the conversation Id , pp 6-8

On March 6, 2013, based on this telephone conversation, Petitioner was arrested pursuant to two warrants, Nos 2013 A 4010600165 and 2013 A 4010600166, for child molestation under S C Code Ann §§ 16-03-655(A)(1) and 16-03-655(A)(2), respectively

On July 18, 2013, these warrants were subsumed under Indictment Nos 2013-GS-40-04051 and 04052

On September 11, 2013, Petitioner filed a Motion to Suppress in the trial court [App 1 & 2] On September 26, 2013, the Honorable Alison Renee Lee, Presiding Judge for the Court of General Sessions for the Fifth Judicial Circuit, issued an Order finding that the circuit court was without subject matter jurisdiction under S C Code Ann §§ 17-30-10 et seq , and further finding that the Court of Appeals is the exclusive reviewing authority as defined under the South Carolina Wiretap Act [App 5]

On October 9, 2013, Petitioner filed a Motion to Suppress in the Court of Appeals [App 6 & 7] On October 21, 2013, the Court of Appeals issued an Order denying Petitioner's Motion, finding that the only issue to be determined under the Wiretap Act is whether one of the parties to the wiretap consented to law enforcement's taping of the electronic communication [App 8] The Court of Appeals further found that "[T]here is no evidence Respondent utilized deceit, trickery or misrepresentation to induce the victim to consent to the instant communication " Id Finally, the Court of Appeals "[D]ecline[d] to address Petitioner's constitutional grounds as well as those based on Rule 403, SCRE " Id , n 1

On November 4, 2013, pursuant to SCRAP, Rule 221, Petitioner filed a Petition for Rehearing [App 9 & 10] The Court of Appeals denied the Petition for Rehearing on December 4, 2013, [App 12], before Petitioner had the opportunity to file a timely Reply

Brief On December 6, 2013, Petitioner filed a Motion for Reinstatement and Petitioner's Reply to State's Response to Petition for Rehearing, [App 13 & 14], which was denied on February 4, 2014 [App 15]

Petitioner now files this Petition for Writ of Certiorari under SCRAP, Rule 242

ARGUMENT

The Petitioner's Motion to Suppress the electronic recording is based on his contention that the rulings of the trial court and Court of Appeals demonstrate that S C Code Ann § 17-30-110(A) (Supp 2012) is unconstitutional on its face and as applied in this case because the statute does not require an evidentiary hearing upon the filing by the non-consenting party of a motion to suppress a taped conversation, in violation of due process rights protected by the Fourth and Fifth Amendments of the United States Constitution See *State v Blassingame*, 271 S C 44, 244 S E 2d 528 (S C 1978) and *State v Patton*, 322 S C 245, 472 S E 2d 245 (S C 1996)

I South Carolina's Wiretap Act is facially unconstitutional under the Fifth Amendment.

The Fifth Amendment provides that "No person shall be deprived of life, liberty, or property, without due process of law " This principal provides the overarching bedrock for all search and seizure cases

S C Code Ann § 17-30-30(B) provides that "It is lawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception." A wire, oral, or electronic communication that has been intercepted in violation of the Wiretap Act is not admissible into evidence in any trial or hearing in a court in this State S C Code Ann § 10-30-65 A motion to suppress "must be made before the reviewing authority and must be decided on an expedited basis " S C Code Ann § 17-30-110(A) "Reviewing authority" is defined as "a panel of three judges of the South Carolina Court of Appeals ." S C Code Ann

§ 17-30-15(9) “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 . . . The reviewing authority may, *in its discretion*, conduct a hearing and require additional testimony or documentary evidence ” S C Code Ann § 17-30-110(A)(emphasis added)

The trial court found that under the statutory scheme set forth above, it was without jurisdiction to consider a motion to suppress under the Wiretap Act as it was not a “reviewing authority” as defined under the Act, relying on *State v Whitner*, 399 S C 547, 732 S E 2d 861 (S C 2012) (involving a consent exception to the South Carolina Wiretap Act) In *Whitner*, the Supreme Court noted that South Carolina’s Wiretap Act is modeled after the Federal Wiretap Act, 18 U S C §§ 2510 *et seq* 399 S C at , 732 S E 2d at 865 However, the Federal Wiretap Act provides that “Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that – (i) the communication was unlawfully intercepted ” 18 U S C § 2518(10)(a) Furthermore, the Federal Wiretap Act provides that “The remedies and sanctions described in this chapter . . are the only judicial remedies and sanctions for *nonconstitutional* violations of this chapter involving such communications ” 18 U S C § 2518(10)(c)(emphasis added) Thus, the Federal Wiretap Act expressly recognizes that constitutional violations are not pre-empted by that Act and are preserved for appeal

In contrast, the procedure under the South Carolina Wiretap Act is radically different, and constitutionally unsound, from the procedure provided for under the Federal Wiretap Act The South Carolina Wiretap Act does not provide for an initial fact finding hearing by the court of original jurisdiction Rather, the South Carolina Wiretap Act creates an

“expedited” procedure directly to the Court of Appeals. The evidentiary record is selectively presented to the “reviewing authority” and a hearing is “discretion[ary],” not mandatory. This procedure is not sufficient to meet the due process requirements of the Fifth Amendment. Therefore, the South Carolina Wiretap Act is unconstitutional on its face.

II South Carolina’s Wiretap Act is unconstitutional under the Fifth Amendment as applied in this case.

Furthermore, as applied in this case, Petitioner’s Fifth Amendment constitutional rights were violated. The Court of Appeals, as the reviewing body, did not follow the procedure prescribed under S.C. Code Ann. § 17-30-110. The Court of Appeals did not request (i) records from the lower court in this case—Criminal Records Division, Office of the Richland County Clerk of Court, (ii) copy of the transcript from the Court Reporter of the motion hearing in the Court of General Sessions, or (iii) the “CD of phone call” included in the States’s Discovery. All of the evidentiary record was provided by the Petitioner as attachments to his motions and pleadings. Thus, the Court of Appeals had an incomplete record as required by the Wiretap Act upon which to review Petitioner’s Motion to Suppress. Furthermore, the Court of Appeals did not conduct an evidentiary hearing on the merits of Petitioner’s motion to suppress.

The Court of Appeals 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, the Court of Appeals emphatically declined to address Petitioner’s constitutional grounds as raised in his Motion to Suppress. Said Order reads, in pertinent part

¹We 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)

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 allowing law enforcement to electronically record the conversation in question Ashley Jones' medical profile described in footnote one above demonstrates that there is significant doubt as to her capability to consent to the phone tap, as well as the voluntariness of the alleged victim's consent under S C Code Ann §17-30-30. Only a due process hearing could determine these issues

III **The continued taping of the February 28, 2013, conversation after the Petitioner inquired whether the conversation was being taped violated Petitioner's Fourth Amendment rights.**

Petitioner asserts that the continued taping of the February 28, 2013, conversation after the Petitioner inquired whether the conversation was being taped violated his legitimate expectation of privacy after that point Fourth Amendment rights were described 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* A claim of Fourth Amendment violations requires, first, a determination "whether the defendant has a legitimate expectation of privacy," and, second, a determination as to "whether the police violated his Fourth Amendment rights " *State v. Bruce*, 402 S C 621, 624, 741 S E 2d 590 (2013) 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

The taped conversation, itself, reveals a violation of Petitioner's Fourth Amendment rights "against unreasonable searches and seizures" Inv Holdorf of the Richland County Sheriff's Department (a) led the alleged victim to have Petitioner make self-incriminating statements; and, (b) encouraged alleged victim to lie as well as give false and misleading statements. Also, there is a question of taint Ashley lied to Petitioner about whether the conversation was being recorded, who she was with and where she was. In addition, the scripting of Ashley's questions by law enforcement to manipulate the Petitioner's emotions and judgment went beyond merely obtaining consent of the victim to record the telephone call. The Respondent's instruction and control over the alleged victim is patently evident in the notes made by the Respondent during the conversation. [App 2, Exhibit A to Memorandum of Law in Support of Motion to Suppress]

Normally, there is no expectation of privacy with respect to the other person in a conversation, therefore, that person can unilaterally consent to the recording of the conversation. However, in this case, the critical Fourth Amendment violation occurs at the beginning of the conversation when Ashley asks Ryan if he "remember[s] anything about our past, about like the sexual abuse or anything like that?" [App 7, Petitioner's Memorandum of Law in Support of Motion to Suppress, Exhibit D, transcript of February 28, 2013 phone call, p 1, lines 17-18] Ryan's response is to ask "Where are you right now?" Id., p 1, line 22, "Who is at your house now? I mean " Id , p 2, line 18 (and 20), and then "Are you like , I mean, are you like recording this? That's the thing " Id , p 2, line 22 and "I mean, are you, is this a recording, I mean " p. 4, line 9 and "Is this, you said this isn't a recording? I mean" p 5, line 16. And Ashley replies "No, it's not, I'm at home " Id , p 5, line 17. At that point, the recording should have stopped because Ryan had expressed his expectation of privacy to Ashley. Up until that point, Ryan had not made any incriminating

statements, but at the direction of the two police officers present, Ashley continues the conversation and eventually Ryan makes an apology and harmful admissions Id pp 6-8

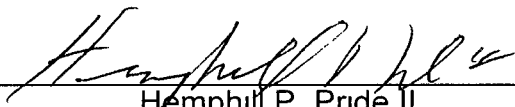
Although Respondent argues that the conversation is admissible under S C Code Ann §17-30-30, Petitioner would counter that the officer induced the alleged victim to facilitate the phone call all the while intentionally directing the alleged victim to tell the Petitioner lies as well as misrepresent material facts The recording should have stopped at page 5, but continues past Ryan's repeated expression of his expectation of privacy, removing this case from other consent taping cases and, thereby, violating Petitioner's Fourth Amendment rights

CONCLUSION

Based on the foregoing, the Petitioner respectfully requests that the motion to suppress be granted due to violations of his Fourth and Fifth Amendment rights

Respectfully submitted,

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