THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DAVID EUGENE ROSIER JR.,

APPELLANT

APPELLATE CASE NO. 2013-002259

Appeal from Aiken County

Doyet A. Early, III, Circuit Court Judge

Opinion No. 2015-UP-275

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on June 3, 2015. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, Appellant submits the following:

Appellant David Rosier was convicted of voluntary manslaughter and possession of a weapon during the commission of a crime of violence. He received the maximum sentence of thirty years. Rosier argued on appeal that the trial court erred in denying his motion to either suppress the jail calls involving Rosier or grant Rosier a continuance in order to make a motion to the "reviewing

authority," which is a three judge panel of the Court of Appeals, for a hearing to determine if the jail calls violated the Homeland Security Act found at S.C. Code Section 17-30-10 through 145.

The Court of Appeals ruled that the trial court did not have the jurisdiction to determine whether the calls should be suppressed under the Act, Section 17-30-110 (A)(1), as the "reviewing authority" was the Court of Appeals pursuant to the Act. This Court also ruled that Rosier waived his opportunity to seek a determination from the Court of Appeals as to whether the jail phone calls should be suppressed because he never made a motion to this Court prior to trial as required by the statute, and he failed to assert that he did not have the opportunity to seek a determination as to whether the jail calls should be suppressed. This Court held that the trial court's denial of Rosier's motion for a continuance did not prevent Rosier from filing the motion to suppress to the Court of Appeals as the trial would have been stayed pending a ruling from the Court of Appeals.

The Court of Appeals ruled that the trial court's ruling denying the motion to suppress was void. The Court relied on State v. Whitner, 399 S.C. 547, 732 S.E.2d 861, 863 (2012) which held that a trial court lacked subject matter jurisdiction to suppress evidence under the Act because such motions must be made before a panel of judges of the Court of Appeals.

The Court of Appeals misapprehended the issue.

South Carolina Code Section 17-30-10 provides that the interception of wire, electronic, or oral communications is authorized only in the manner permitted by this chapter. A wire communication is defined in 17-30-15(1) as any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception including the use of this connection in a switching station furnished or operated by any person engaged in providing or operating the facilities for the transmission of intrastate, interstate or foreign communications.

Section 17-30-15(3) defines intercept as the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

Section 17-30-110 provides that prior to any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body, or other authority, any aggrieved person may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived there from, on the grounds that the:

(1) communication was unlawfully intercepted;

(2) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(3) interception was not made in conformity with the order of authorization or approval.

The statute states that the motion must be before the reviewing authority and must be decided on an expedited basis. The reviewing authority pursuant to Section 17-30-15(9) means a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals.

In a pretrial motion, defense counsel moved before the trial court for a continuance to review more discovery. Another independent reason for the continuance was to determine whether the wiretapping of the jail phone calls between Rosier and his sons was legal under the Homeland Security Act. Counsel cited S.C. Code Section 17-30-110 which provided: "Prior to any trial in any court, the aggrieved party may make a motion to suppress the use of an intercepted communication on the grounds that the communication was unlawfully intercepted."

Counsel went on to explain that the statute stated that the motion would be heard before the "reviewing authority" which was defined in Section 17-30-5 as a panel of three judges of the South

Carolina Court of Appeals, designated by the Chief Judge of the Court of Appeals. Counsel stated that she had not made any motion before the Court of Appeals who had jurisdiction to make the determination if the interception of the jail calls was in accordance with the Homeland Security Act. She told the judge that she set this out in her memorandum which was presented to the trial court and made Court's Exhibit One. Counsel argued this was another reason for a continuance. R. 6, ll. 1- R. 7, ll. 16; R. 5.

The judge asked defense counsel if she wanted to argue her motion concerning the Homeland Security Act then or the next day. Counsel chose to argue it then. R. 13, ll. 9 – 19. Counsel argued that one of the reasons she made a motion for a continuance was to have the Court of Appeals decide if the jail calls of Rosier were intercepted properly pursuant to Section 17-30-10 etc. Counsel objected to the calls being admitted because they were in violation of the Homeland Security Act found at Section 17-30-10 et seq. R. 15, ll. 1 – 17.

Counsel stated that the Act provides that any interception of a wire communication, which includes any oral transfer which was a telephone call, must be made in accordance with that Act. Counsel argued that was nothing in the Act that differentiated a jail call from that of any other person. There was nothing in South Carolina that excluded jail calls from coming under the Act. R. 15, ll. 13 -25.

Counsel argued that the only time law enforcement was allowed to tape phone calls under the Act was when they had a court order issued by a judge. There was nothing in the law addressing the use of these jail calls by the detention center staff. R. 19, ll. 8 – R. 20, ll. 24.

Counsel expected the state to argue that Rosier had no right to privacy as an inmate, but counsel pointed out that he still had the presumption of innocence at that point. He had to communicate with family members about his case. R. 16, ll. 23 – 17, ll. 12. Counsel said it was her

understanding that the calls could now be routed directly to the solicitor's telephone, and the solicitor could choose which inmate they wanted to eavesdrop upon. This was a violation of the law and went beyond the probable purpose of the interceptions being to protect the safety of the jail. R. 17, ll. 13 – R. 32, ll. 9.

In State v. Ellefson, 266 S.C. 494, 224 S.E.2d 666 (1976), the Supreme Court reversed and remanded because the copying of the pretrial detainee's outgoing letters without legitimate jail purpose or probable cause violated detainee's constitutional rights under the First and Fourth Amendments. The Court held that the appellant was merely in pretrial confinement to insure his presence at trial. The Court wrote: "If jail security justified surveillance of his mail, then the jail officials could open the letters in order to achieve that legitimate government purpose. However, the shibboleth of jail security is not a passport to wholesale abuse of the appellant's constitutional rights." The Court went on to hold that a pretrial detainee was not disrobed of his constitutional rights and laid bare for the zealous investigation of his case. He was still cloaked with the presumption of innocence, and retained all the rights of an ordinary citizen except those taken form him by law. The Court stated: "Nevertheless, our respect for constitutional rights of citizens requires that the state not seek advantage by the use of evidence gained by trampling upon those rights."

Defense counsel argued before the judge either that the calls be suppressed or the trial court grant her a continuance so she could make a motion to the Court of Appeals. Counsel also argued that the circuit court did not have jurisdiction or authority to decide if the calls were a violation of Section 17-30-10 and 110. Trial counsel argued:

> And as I said, the reviewing authority means a panel of the judges of the South Carolina Court of Appeals designated by the chief Judge of the South Carolina Court of Appeals.
> So, I don't know that this court has jurisdiction to even make a determination about whether the calls are validly under the Act.

R. 15, ll. 1 – 18.

The judge denied the motion to suppress the jail calls as he found that the calls were not covered by the Homeland Security Act. R. 33, ll. 1 – 7. The judge had previously denied the motion for a continuance. R. 10, ll. 21 – 22.

From the statute, it is clear that the telephone calls between Rosier and his two sons fit the definition of wire communication. The calls met the definition of intercept. The state presented no evidence that the interceptions of the jail calls were lawfully made. There was no evidence presented that a judge had ordered the interceptions. The detention staff were not SLED agents which is allowed under the Act.

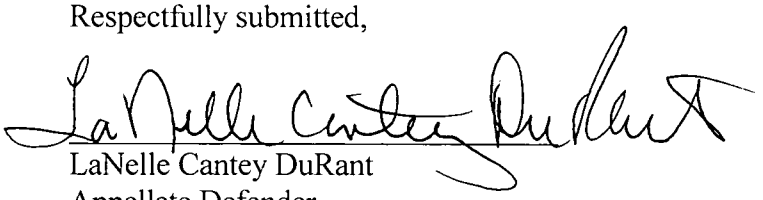
The trial court was in error in ruling that the jail calls did not come under the Homeland Security Act as that decision was clearly in the sole domain of the Court of Appeals by law. Trial counsel was put in the position of arguing the motion then in order to have it on the record or have no objection to the admission to the jail calls.

Trial counsel argued in her Motion for a Continuance (Court's Exhibit 1 at R. 222), that the trial court assume control of the scheduling of this trial pursuant to State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012). This would have allowed the trial court to continue the trial in order for the motion to suppress the jail calls be made to the Court of Appeals for disposition.

In State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012), the Supreme Court held that absent an ambiguity, the court will look to the plain meaning of the words used in the statute to determine their effect. All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.

WHEREFORE, Appellant respectfully requests this Court to grant his petition for rehearing and reconsider its affirmance of Appellant's conviction and sentence and remand the case for a new trial or a hearing before the Court of Appeals for a determination on the jail calls.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

This 11th day of June, 2015.

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SC Court of Appeals

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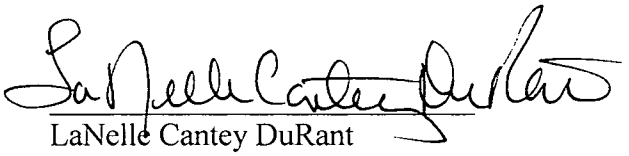
CERTIFICATE OF SERVICE

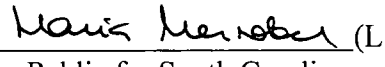
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and t Mr. David Eugene Rosier, # 141435, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 11th day of June, 2015.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 11th day
of June, 2015.



Notary Public for South Carolina
My Commission Expires: July 3, 2023.