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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 2015-UP-275 (S.C. Ct. App. filed 6/3/2015)
2013-GS-02-00767

THE STATE,

RESPONDENT,

V.

DAVID EUGENE ROSIER,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 8/26/2015.

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the trial court's denial of Petitioner Rosier's 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.

STATEMENT OF THE CASE

On May 13, 2013, the Aiken County Grand Jury indicted David E. Rosier on the charges of murder and the possession of a weapon during the commission of a crime of violence. On October 7-10, 2013, Rosier proceeded to trial before the Honorable Doyet A. Early, III, and a jury. Rosier was represented by Wallis A. Alves and C. David Hayes. The state was represented by Kevin Molony and David W. Miller. The jury found Rosier guilty of the lesser offense of voluntary manslaughter and the possession of a weapon during a crime of violence. R. 206, ll. 18 – R. 207, ll. 9. Judge Early sentenced Rosier to the maximum sentence of thirty years on the voluntary manslaughter and five years on the gun charge to run concurrently. R. 219, ll. 9 – 20. Rosier's trial counsel filed a notice of appeal. The Court of Appeals affirmed Rosier's convictions and sentences in an unpublished opinion on June 3, 2015. State v. Rosier, Op. No. 2015-UP-275 (Ct. App. filed June 3, 2015). Counsel filed a petition for rehearing which was denied on August 26, 2015. This petition for a writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in affirming the trial court's denial of Petitioner Rosier's 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.

On November 10, 2012, David Rosier and his son, Calvin, were able to pay for Rosier's other son, Josh, to bond out of the local detention center. In order to raise enough money for the bond, the father Rosier and Calvin had to remove copper from the old family home which was not being used at the time, to sell. R. 91, ll. 12 – 25; R. 95, ll. 1-25. After getting Josh out, Josh immediately started calling his girlfriend, Brittany, to tell her their relationship was over because she did not help with paying his bond which she had agreed to do. He just wanted to get his clothes. R. 123, ll. 7 – R. 129, ll. 14.

Then the three of them-David, Josh, and Calvin- went home to eat and let Josh shower and dress. David Rosier said they had no real plans for the evening except he was going to see his girlfriend, Katie. They borrowed the car of a friend of Rosier's, Terry Phillips, and took Josh to get his clothes from the place Josh and Brittany had been living. Then they went to the Rainbow Bait and Tackle Store and watched the Georgia-Alabama football game. R. 129, ll. 15 – R. 131, ll. 8.

Then Josh got a call from Brittany, and Josh said he needed to go see her. Then Rosier, Josh, Calvin, and Cody, the son of Terry Phillips and who was designated to drive Terry's car, went to Brittany's dad's house. Josh went in alone, and came out with Brittany and another girl named Autumn. Rosier just wanted to get away from them because he did not like Brittany. They took him

to his girlfriend's, Katie's, house but she had left. R. 131, ll. 9 – R. 132, ll. 25; R. 124, ll. 20 – R. 125, ll. 4.

In the meantime, Brittany and Autumn started talking to Josh about three guys whom they all knew. The men were Russell Blackmon, C. J. Shaw who was the nephew of Rosier, and Colby who was a cousin of C.J. The three men and another man named D.J. Davis, were close friends and hung out at the same house most of the time. R. 107, ll. 2 – 24; R. 114, ll. 10 – R. 115, ll. 6; R. 133, ll. 6 – 10.

Brittany, who was sitting on Josh's lap in the backseat, started telling Josh that Blackmon and Colby and C.J. held her and Autumn in a motel room. Josh started getting very frustrated and angry. At this point, they had no plans to do anything but get groceries. R. 133, ll. 20 – R. 136, ll. 10.

Rosier kept telling Josh to let it go because Josh just got home and did not need to get in any more trouble. Finally, Rosier decided they just needed to go to Blackmon's place and confront Blackmon about the incident in the motel room with Brittany. The only reason Rosier wanted to go was to keep Josh from getting in any more trouble. Rosier had just torn up his family home to get money to bond Josh out. Rosier denied there was any plan to fight Blackmon or to rob him. R. 136, ll. 12 – R. 137, ll. 25.

Rosier had no weapons except he carried a pocketknife that he used doing his work as an electrician. He said he never gave that knife to Josh. He went to the house with his son, Josh, and C.J. answered the door when Rosier knocked. Rosier asked to see Blackmon. Rosier's testimony was that he saw Josh then get into a physical altercation with the young man sitting on the sofa. Blackmon and C.J. then come running into the room. Blackmon had a pistol and pointed it at Josh and then at Rosier. Rosier began wrestling with Blackmon to get the gun. During this, the gun went

off and Josh screamed. Rosier picked up the gun from the floor and ran to the car where Calvin and the others were waiting. Josh came running and they left. R. 138, ll. 1 – R. 140, ll. 23.

Rosier did not know that the young man on the sofa had been shot and killed until the others saw it on Facebook that night. He did not know that the young man had been cut with a knife as well. Josh's hand had been shot also. Rosier sold the gun for \$30 at the Waffle House that night. He left the others and got a motel room that Saturday night. He was arrested Monday morning. R. 140, ll. 24 – R. 144, ll. 25.

Josh's testimony differed from his father's. According to Josh, he and his father and Calvin, had telephone conversations when Josh was still incarcerated before they bonded him out on November 10, 2012. These concerned declaring war on Russell Blackmon, C.J. Shaw, D.J. Davis and Colby. Josh learned that Brittany was seeing D.J. Davis. They were going the "beat their ass." R. 52, ll. 1 – R. 60, ll. 25.

Josh's testimony was similar to his father's, until the point they got to the house where the incident took place. Josh said his father gave him the knife as they walked up to Blackmon's house. The knife was like a box cutter with a razor blade type cutter. Neither Josh nor his father had guns. R. 64, ll. 1 – 68, ll. 25.

When they entered the house, D.J. Davis was sitting on the couch. C.J. was also in the room. Josh and D.J. started fighting. Blackmon entered the room holding a .357 revolver pistol. His dad hit Blackmon and the gun fell to the floor. Josh then started cutting D.J. with one hand when D.J. was sitting on the sofa, while holding D.J. down with his other hand. Josh then heard a gunshot. D.J. was shot. Josh turned around and saw his father standing there holding the same revolver. As they were leaving, his dad pointed the gun at C.J. who was crying. Josh told his dad not shoot C.J. because he was a relative. Josh and David Rosier then left. R. 69, ll. 6 - 74, ll. 25.

Calvin testified that he was in the car with his dad, Rosier, and his brother Josh on the night of the incident. Calvin never went in the house, but he was charged with accessory after the fact of murder. No one had guns, but he saw a gun in his dad's lap when they returned to the car. R. 91, ll. 12 – 25; R. 92, l. 1 – 25; R. 106, ll. 8 – 23; 103, ll. 1 – 19. Calvin confirmed that there was no plan to fight anyone, and that his father told Josh to leave it alone when Josh got upset about Blackmon trying to tie Brittany up in a motel room. His dad tried to get Josh to calm down. However, when Josh meant he was going in the house to fight, his dad, Rosier, was not going to let Josh go in by himself. R. 100, ll. 1 – 25; R. 101, ll. 1 – 25; R. 102, ll. 1 – 25; R. 103, ll. 1 – 17. He learned about the death of D.J. Davis when Brittany pulled it up on Facebook when they stopped at a gas station that night. Calvin did not know Davis. R. 93, ll. 13 – R. 94, ll. 24; R. 99, ll. 14 – 23.

Calvin talked with his dad via telephone after his dad was incarcerated. R. 104, ll. 23 – R. 106, ll. 9. Calvin had also talked with Josh during his incarceration before the incident happened. R. 96, ll. 7 – R. 99, ll. 25.

C.J. Shaw testified that he saw everything. The gun Rosier had was C.J.'s gun. C.J. called 911. R. 107, ll. 1 – R. 109, ll. 15.

The pathologist, Dr. Janice Ross, performed the autopsy on D.J. Davis. Davis died from bleeding of the heart due to a gunshot wound to the chest. Davis also had incised lacerations to his face caused by sharp instrument. R. 43, ll. 14 – R. 44, ll. 9; R. 46, ll. 6 – R. 47, ll. 14; R. 48, ll. 10 – 18; R. 50, ll. 13 – R. 51, ll. 5.

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 allowed defense counsel to argue her motion concerning the Homeland Security Act more in depth at a later time because the judge needed to address that issue. 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 et seq. 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 listen. This was a violation of the law and went beyond the probable purpose of the interceptions of being to protect the safety of the jail. R. 17, ll. 13 – R. 32, ll. 9.

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.

In his closing argument to the jury, the solicitor referred to Rosier by his nickname of "Dollar." Defense counsel objected on the basis that it went to show improper character to refer to Rosier as "Dollar." The judge ruled that he would allow it during argument. This had come out earlier during Josh's testimony when he said his father was known as "Dollar Bill" and Josh was known as "Little Man." R. 68, ll. 9 – 20; R. 173, ll. 5 – 20.

Later in his closing argument the solicitor said to the jurors:

Your decision that you're going to make in this case is important. It's an important one for the family and friends of D.J. Davis. It's an important one for this community.

R. 180, ll. 2 – 5.

Defense counsel objected as improper argument. The judge said: "All right. Go ahead." R. 180, ll. 6 – 7.

Discussion

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.

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.

Defense counsel asked in her written memorandum (Court's Exhibit One) and in oral argument 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.

The trial court was in error in ruling that the jail calls did not come under the Homeland Security Act as that was clearly in the sole domain of the court of Appeals by law.

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.

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

jail phone calls should be suppressed because he never made a motion to the Court of Appeals 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. The Court of Appeals 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.

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 from 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.

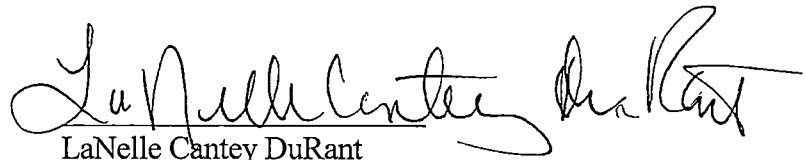
Trial counsel argued in her Motion for a Continuance (Court's Exhibit 1 at R. 222), that the trial court assume control of the scheduling of this trial pursuant to State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012). This would have allowed the trial court to continue the trial in order for the motion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

Since the Court of Appeals ruled that the trial court's denial of the motion to suppress was void, the evidence of the phone calls were erroneously admitted because the court lacked jurisdiction. The jail call where Rosier and his son Calvin were talking with his son Joshua when Joshua was in jail, were extremely prejudicial to Appellant Rosier. The jury heard Rosier and Calvin talk about declaring war. Joshua explained that that meant that he, his father Rosier, and his brother Calvin were declaring war on CJ, DJ (the deceased), Colby and Russell. R. 59, ll. 12 – R. 60, ll. 23.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences should be reversed, and the case remanded for a new trial or in the alternative for a hearing before the Court of Appeals

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant".

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 10th day of September, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 2015-UP-275 (S.C. Ct. App. filed 6/3/2015)
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SC Court of Appeals

THE STATE,

RESPONDENT,

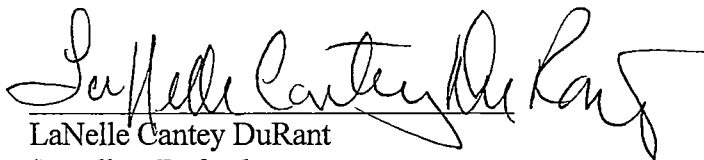
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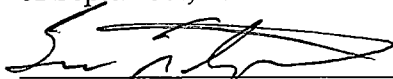
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Deborah Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. David Rosier, #141435, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, and the S.C. Court of Appeals this 10th day of September, 2015.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day
of September, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

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September 10, 2015

SEP 10 2015
SC Court of Appeals

Deborah Shupe, Esquire
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: The State v. David Rosier

Dear Deborah:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the S.C. Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

LaNelle Cantey DuRant
Appellate Defender

LCD/lmv

Enclosures

cc: Court of Appeals