

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Appeal From Aiken County
The Honorable Doyet A. Early, III, Circuit Court Judge
Appellate Case No. 2015-001897
(Op. No. 2015-UP-275, S.C. Ct. App., filed June 3, 2015)

THE STATE,

Respondent,

v.

DAVID EUGENE ROSIER,

Petitioner.

**RETURN TO PETITION FOR WRIT OF
CERTIORARI TO THE COURT OF APPEALS**

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF QUESTIONS ON APPEAL

I. Did Petitioner waive the issue of the circuit court's jurisdiction to determine the applicability of the Homeland Security Act to recordings of inmate telephone calls from jail?

II. Did the circuit court properly determine the Homeland Security Act does not apply to the recordings at issue in this case?

STATEMENT OF THE CASE

On May 13, 2013 the Aiken County Grand Jury indicted Petitioner David E. Rosier on one count of murder and one count of possession of a weapon during the commission of a crime of violence. The charges arose from an incident on November 10, 2012, during which Petitioner shot and killed Donnie James (“D.J.”) Davis (the “Victim”). The case was called for a jury trial on October 7, 2013, before the Honorable Doyet A. Early, III, Circuit Court Judge.

Prior to trial, Petitioner moved to suppress recordings of telephone calls he made from the Aiken County Detention Center, asserting the recordings constituted an illegal wiretap under the South Carolina Homeland Security Act (“the Act”), and law enforcement was only allowed to intercept communications with a court order. The State argued Petitioner consented to the recordings by using the jail telephones in light of signs at the telephones and an audio recording advising the parties the call will be recorded. The circuit court denied the motion to suppress, finding the jail calls were not subject to the Act. (Record on Appeal [R.], pp. 15-33).

The pathologist who performed the Victim’s autopsy testified the Victim had a gunshot wound in the chest, and the bullet went through the heart and the aorta. In addition, the Victim had “incise wounds” on the right side of his head. The pathologist determined the cause of death was exsanguination due to the laceration of the Victim’s heart and aorta. (R., pp. 44-51).

Petitioner’s son, Joshua Rosier (“Josh”), testified he was in jail for five days prior to the murder, and identified the recordings of phone calls he made to his brother and Petitioner from the jail. Josh stated his brother and Petitioner “declared war” on Carlton “C.J.” Shaw (Petitioner’s nephew), Donnie “D.J.” Davis (the Victim), Colby Reed and Russell Blackmon, which meant “we was going to go beat their ass.” (R., pp. 52-60).

On the morning of November 10th, Josh bonded out of jail. His brother and Petitioner picked him up, and they spent the early evening drinking and watching college football, then picked up Josh's girlfriend and her friend. Josh testified they eventually drove to Russell Blackmon's house "to get the dope that they had and jump on D.J. and Russell and Colby." When asked to clarify what he meant by "jump on" he stated "whoop their ass." (R., pp. 61-64).

Josh and the Petitioner walk to the house. Josh testified neither man had a gun, but Petitioner handed him a blue box-cutter knife, "in case I needed it." (R., pp. 65-68).

Petitioner knocked on the door and identified himself as "Dollar," which was an abbreviated version of his nickname, "Dollar Bill." Petitioner's nephew and the Victim were in the living area when they entered the house, and Josh got into a fist fight with the Victim. According to Josh, Blackmon entered the room holding a gun, and Petitioner hit him and knocked the gun to the floor. Josh pulled out the box cutter Petitioner gave him, and repeatedly cut the Victim with it until he heard a gunshot. Josh testified he turned and saw Petitioner holding the gun. When Petitioner pointed the gun at Josh's cousin, Josh begged him not to shoot because he was related to them. (R., pp. 69-74).

Josh and Petitioner then fled the house, and Petitioner still had the gun used in the shooting. Josh testified he realized he had been shot in the hand, and when he told Petitioner, Petitioner replied, "next time move out of the f**king way." (R., pp. 74-77).

They drove to a gas station, and Josh gave the box-cutter knife to his girlfriend to get rid of it. The girlfriend gave it to her friend, who rinsed the blood off, wrapped it in paper towels and dropped it in the trash. They ultimately drove to a house in Augusta, Georgia, "to get away from the cops." (R., pp. 78-80).

Petitioner sold the murder weapon to a man at the house in Augusta, and Josh took a shower and put his blood-stained clothes in a burn barrel. Petitioner subsequently left the house on foot, and the girlfriend's father picked the others up the next day to take them home. Josh was arrested at his home the following day, and took police to the house in Augusta where the truck they drove was still parked. (R., pp. 81-84).

A forensic scientist with SLED testified she analyzed several swabs SLED received from the Aiken County Sheriff's Department, including swabs from the truck, the porch of the home where the shooting occurred, a swatch of khaki shorts fabric, and a folding knife, as well as a sample of the Victim's blood for DNA comparison purposes. She further testified the blood found in the vehicle was the Victim's blood, and the probability of randomly selecting an unrelated individual with a matching DNA profile was one in ninety-five trillion. (R., pp. 85-90).

Petitioner's nephew, Carlton "C.J." Shaw ("Shaw"), testified he let Josh and Petitioner into Blackmon's house, and went to the back of the house to tell Blackmon that "Dollar" was there. When the fight broke out, he and Blackmon came into the living area and saw Josh punching the Victim, and Petitioner pointing a gun. Petitioner shot the Victim when he got up to run away, and when Shaw tried to run out the front door, Petitioner grabbed him and threw him against the front door, but Josh stopped Petitioner from shooting him. Shaw testified the gun used in the murder belonged to him, it was laying on a table in the living area when he went to get Blackmon, and he saw Petitioner shoot it that night. (R., pp. 107-121).

The jury convicted Petitioner of voluntary manslaughter and possession of a weapon during a crime of violence, and the circuit court sentenced him to concurrent prison terms of thirty years and five years, respectively. (R., pp. 206-207, 219). This appeal followed.

By unpublished opinion filed June 3, 2015, the South Carolina Court of Appeals affirmed Petitioner's convictions, specifically finding Petitioner waived the issue of the circuit court's jurisdiction to decide whether the Homeland Security Act applied to the recordings. (Appendix, pp. 1-4). The Court of Appeals denied Petitioner's Petition for Rehearing by Order filed August 26, 2015. (Appendix, p. 13). On September 10, 2015, Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals, seeking review of the Court of Appeals decision.¹

¹The Court of Appeals also found the circuit court properly overruled Petitioner's objections to portions of the State's closing argument. Petitioner did not raise the closing argument issue in his Petition for Rehearing or his Petition for Writ of Certiorari to the Court of Appeals, and therefore, the issue is not before this Court. *See* Rule 242(d)(2), SCACR (only issues raised in the Court of Appeals and in the petition for rehearing may be included in a petition for writ of certiorari).

ARGUMENT

I. Petitioner waived the issue of the circuit court's jurisdiction to decide whether the Homeland Security Act applied to the recordings of inmate telephone calls from jail.

Petitioner asserts the Court of Appeals erred in "affirming" the circuit court's denial of his motion to suppress the jail phone call recordings. As a threshold matter, the Court of Appeals did not affirm the circuit court's ruling. Rather, the Court found the ruling was void because the circuit court was not the "reviewing authority" under the Act.

The Court then found Petitioner waived the jurisdiction issue because he never made an appropriate motion to the Court of Appeals, which is the statutory "reviewing authority" under the Act, and Petitioner had ample opportunity to make such a motion. The Court noted the circuit court's denial of Petitioner's motion for a continuance did not preclude filing a motion in the Court of Appeals to suppress the recordings, and filing such a motion would have automatically stayed the trial. The Court concluded Petitioner acknowledged in the circuit court that the Court of Appeals is the statutory reviewing authority, admitted he had not filed a motion in the Court of Appeals, and then proceeded to argue the merits of the issue to the circuit court, and therefore, he could not complain about an error his own conduct induced. (Appendix, pp. 2-3).

It is abundantly clear from the record Petitioner had ample time to file a motion to suppress in the Court of Appeals prior to trial. The pre-trial hearing took place on Monday, October 7, 2013. At that time, Petitioner submitted a fifteen page written motion for a continuance on the grounds certain witnesses had changed their original statements, which required additional trial preparation time, but did not mention the jail phone call recordings at all. (R., pp. 222-236). The circuit court denied the motion for continuance, but indicated it would

consider delaying the trial until Wednesday if Petitioner needed additional time to review any new statements. (R., pp. 9-13).

At the hearing, Petitioner referenced the Act in connection with the jail recordings, and questioned whether the circuit court had jurisdiction to rule on the applicability of the Act, but acknowledged he had not filed a motion in the Court of Appeals on the issue. He then proceeded to argue the merits of the issue, and after extensive arguments by Petitioner and the State, the circuit court took the matter under advisement overnight. Court recessed for the day at 12:45 p.m.² (R., pp. 13-32).

Court re-convened at 9:44 a.m. the next morning. At that time, the circuit court ruled the Act did not apply to the jail recordings. (R., p. 33).

Thus, Petitioner had the time before the case was called on October 7th to prepare an extensive written motion for a continuance in the circuit court, but did not prepare and file a motion in the Court of Appeals. Then, after questioning the circuit court's jurisdiction, Petitioner had the afternoon of the 7th and early morning of the 8th to prepare and file a motion in the Court of Appeals, but did not even attempt to do so, and proceeded with trial. As the Court of Appeals found, Petitioner's conduct constituted a waiver of the issue, and to the extent the circuit court erred, Petitioner induced the error through his conduct.

²The jury was not qualified, selected and sworn until the following morning. (R., pp. 12-13).

II. The Homeland Security Act does not apply to the recordings at issue in this case.

Overlooking Petitioner's waiver, and assuming circuit court error in deciding the recordings did not fall under the auspices of the Act's provisions, the circuit court's ruling was correct as a matter of law. The unambiguous language of the Act clearly exempts the jail phone call recordings from the Act's requirements.

In 2002, the South Carolina General Assembly passed the Act to ensure the safety of South Carolina's citizens, including enhancement of tools available to law enforcement, in light of "the tragic events of September 11, 2001, involving acts of terrorism against the people of the United States and . . . continued threats against the peace and safety of our nation." 2002 Act. No. 339, §2. Thus, the **express** purpose of the Act was to enhance, not restrict, law enforcement's ability to conduct investigations.

"Questions of statutory interpretation are questions of law." State v. Whitner, 399 S.C. 547, 732 S.E.2d 861, 863 (2012). The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature, and all statutory construction rules are subservient to the rule that legislative intent must prevail if it is reasonably discoverable from the statutory language as construed in light of the statute's intended purpose. *Id.* at 863-864. "Under general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation." *Id.* at 864 (*quoting Orr v. Clyburn*, 277 S.C. 536, 290 S.E.2d 804, 806 [1982]).

The Act's wiretap provisions are patterned after the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §2510). *Id.* Therefore, federal court interpretations of the federal law are instructive regarding interpretation of the Act's provision. *Id.*

In United States v. Hammond, 286 F.3d 189 (4th Cir. 2002), the Fourth Circuit considered whether the Bureau of Prison's interception and recording of inmate telephone calls from prison were permissible under the federal wiretap statute. *Id.* at 192. The Court found the law enforcement exception specifically excludes from the definition of "interception" recordings made by an investigative or law enforcement officer in the ordinary course of his duties, and the BOP acted "pursuant to its well-known policies in the ordinary course of its duties in taping the calls." *Id.* (quoting 18 U.S.C. § 2510(5)(a)(ii)).

The Fourth Circuit also found the "consent" exception of 18 U.S.C. § 2511(2)(c) provides it is not unlawful for a person acting under color of law to intercept wire, oral or electronic communications where one of the parties to the communications has given consent prior to the interception, and it applies to prison inmates who are required to permit monitoring as a condition of using the prison telephones. Therefore, the recordings were permissible under both the law enforcement and consent exceptions. *Id.*; see also S.C. Code Ann. §17-30-15(4)(a)(ii) (2014) (law enforcement exception); S.C. Code Ann. §17-30-30(B) (2014) (consent exception).³

Similarly, the Aiken County Detention Center records inmate phone calls from the jail pursuant to its stated policy of monitoring and recording all inmate calls (law enforcement exception), which is conveyed to all inmates when they enter the jail, reiterated in signs posted by the jail telephones, and repeated in a recording at the beginning of every phone call. (R., pp. 20-28). Making a call with knowledge of the policy, and then continuing the call after the recorded warning, constitutes consent to the monitoring and recording of it (consent exception). Therefore, the law enforcement and consent exceptions to the Act expressly exempt the

³These sections of the Act are virtually identical to the federal law for purposes of this analysis.

recordings at issue from the Act, and the circuit court's ruling the Act did not apply was correct as a matter of law.

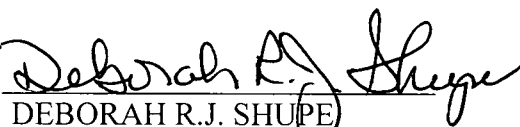
CONCLUSION

Based on the foregoing, Respondent submits the Court of Appeals properly affirmed Petitioner's conviction and sentence, and the Petition for Writ of Certiorari to the Court of Appeals should be denied in its entirety.

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ATTORNEYS FOR RESPONDENT

September 18, 2015

THE STATE OF SOUTH CAROLINA
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THE STATE,

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Return to Petition for Writ of Certiorari to the Court of Appeals on Petitioner by depositing two copies in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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I further certify all parties required by Rule to be served have been served.

This 18th day of September, 2015.


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