

STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GREENVILLE COUNTY

John C Few, Circuit Court Judge

ORIGINAL

RECEIVED

JUN 23 2011

S.C. Supreme Court

THE STATE,

RESPONDENT,

V

SAMUEL L WHITNER,

APPELLANT

SUPPLEMENTAL RECORD ON APPEAL

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INDEX

INDEX	1
STATE'S NOTICE OF APPEAL DATED MARCH 19, 2009	1
MOTION TO VACATE ORDER AND ALLOW MOTION TO BE SERVED AND FILED PURSUANT TO SECTION 17-30-110	2
RETURN TO MOTION TO VACATE ORDER AND ALLOW MOTION TO BE SERVED AND FILED PURSUANT TO SECTION 17-30-110	7
STATE'S REPLY TO RETURN TO MOTION TO VACATE ORDER AND ALLOW MOTION TO BE SERVED AND FILED PURSUANT TO SECTION 17-30-110	12

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

C. Victor Pyle, Jr., Circuit Court Judge

Case No 2009-GS-23-1072

The State,

Petitioner

Samuel Lamont Whitner,

Respondent

REC'D BY COURT
MAR 19 2009

NOTICE OF APPEAL

The State of South Carolina hereby appeals the pre-trial ruling of the Honorable C. Victor Pyle, Jr. granting Respondent's motion to suppress a taped phone call between Respondent and his daughter, the victim of sexual assault by Respondent, which contains vital evidence on the issue of guilt that significantly impairs the prosecution by the State. The date of the pre-trial ruling was Wednesday, March 11, 2009. The ruling was oral and no written order is expected.

Dated: March 19, 2009

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Hon C Victor Pyle, Jr , Circuit Court Judge

The State,

Appellant,

v

Samuel Lamont Whitner,

Respondent

**MOTION TO VACATE ORDER AND ALLOW MOTION TO BE SERVED AND
FILED PURSUANT TO SECTION 17-30-110**

Appellant, The State, through its undersigned counsel, would respectfully show unto this Court as follows

I

Respondent has been indicted on charges of criminal sexual conduct with a minor in the first degree. Respondent's case was called for trial on March 11, 2009. Prior to the jury being sworn, Respondent's counsel moved to suppress an audio recording made by the minor victim's step-father and mother of a phone conversation between Respondent and the minor victim.

II

Neither the step-father nor the mother was a party to the conversation, but the recording was done for the benefit and protection of the minor victim. Law enforcement was

not involved in the case at the time the phone call was recorded. The trial court was provided both a transcript and a copy of the audio recording. The State argued the recording was appropriate under a theory of vicarious consent as expressed in Pollock v Pollock, 154 F 3d 601 (6th Cir 1998) or Kroh v Kroh, 567 S E 2d 760 (N C App 2002).

III

The Honorable C Victor Pyle, Jr, made an oral ruling that the audio recording of the phone conversation should be suppressed because it violates the State's Wiretap Act, codified at section 17-30-10, et seq (Supp 2007)

IV

Section 17-30-110 specifies the sole means to suppress the contents of any intercepted wire, oral, or electronic communication. Specifically, the section provides

(A) 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 therefrom, on the grounds that the

- (1) communication was unlawfully intercepted,
- (2) 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 motion must be made before the trial, hearing, or proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion. The motion must be made before the reviewing authority and must be decided on an expedited basis.

S C Code Ann § 17-30-110(A) (Supp 2007) (emphasis added) Respondent's argument for suppression clearly had to fall under 17-30-110(A)(1) because no order authorizing the interception was involved in this case

V

Section 17-30-110(A) requires Respondent to make the motion to suppress before the “reviewing authority,” which is defined by section 17-30-15(9) of the South Carolina Code (Supp 2007) to mean “a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals” The express language of the statute requires that the motion “must be made before the reviewing authority” Therefore, the statute clearly grants jurisdiction to hear the motion to suppress only to the “reviewing authority,” and does not allow the trial court to hear such a motion

VI

As a result, the trial court in this case did not have jurisdiction to hear a motion to suppress the recording of a communication under this Act The jurisdiction to hear the motion to suppress was reserved to the “reviewing authority” by section 17-30-110, and the trial court’s order suppressing the recorded communication should be vacated Respondent should be required to serve and file the motion to suppress pursuant to the requirements of section 17-30-110

VII

In order to prevent an unnecessary delay of the trial, the State requests Respondent be given thirty days from the date of this Court’s order in which to serve and file a motion to suppress pursuant to section 17-30-110 if Respondent still wishes to move to suppress the recorded communication

WHEREFORE, the State respectfully asks this Court for an order vacating the oral ruling of the trial court or, in the alternative, an order remanding the case to the trial court for the purpose of entering an order vacating the oral ruling Additionally, the State

respectfully asks the Court to require Respondent within thirty days of this Court's order to properly serve and file the motion to suppress, if he chooses to move to suppress the recorded communication, with the "reviewing authority" as required by section 17-30-110

Respectfully submitted,


HENRY DARGAN McMASTER
Attorney General

JOHN W MCINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

WILLIAM M BLITCH, JR
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ATTORNEYS FOR RESPONDENT

March 27, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Hon C Victor Pyle, Jr , Circuit Court Judge

The State,

Appellant,

v

Samuel Lamont Whitner,

Respondent

PROOF OF SERVICE

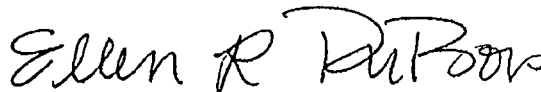
I, Ellen DuBois, certify that I have Served the Motion to Vacate Order and Allow Motion to Be Served and Filed Pursuant to Section 17-30-110 on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to the following

Joseph L Savitz, III, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

Chris Scalzo, Esquire
Greenville County Public Defender's Office
305 East North Street, Suite 123
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served

This 27th day of March, 2009



ELLEN R DuBOIS
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable C Victor Pyle, Jr , Circuit Court Judge

STATE OF SOUTH CAROLINA,

APPELLANT,

V

SAMUEL L WHITNER,

RESPONDENT

RETURN TO THE MOTION TO VACATE
ORDER AND ALLOW MOTION TO BE SERVED
AND FILED PURSUANT TO SECTION 17-30-110

Respondent Samuel Whitner files this return in opposition to the Attorney General s motion to vacate the lower court order, dismiss the solicitor’s appeal, and have a suppression motion filed and heard by this Court

1 Upon information in belief, the Attorney General made its motion to vacate the trial judge’s ruling that the tape recording was not admissible without the benefit of having the suppression hearing transcript. The suppression hearing was held on March 11, 2009. A careful review of that transcript reveals that defense counsel Scalzo argued that the admission of the tape

recording itself being played for the jury, without the jury having the benefit of other conversations between respondent and his child would take the recorded conversation “out of context” since this recorded conversation was “one piece taken out of a broader discussion” Tr 22–23¹ Defense counsel also argued that the tape recording was an attempt to use the child “in hopes that they will get something that they can take to the police to use as leverage” Tr 23 Following this argument which mostly involved “the rule of completeness”, Rule 106, SCRE the judge ruled “I agree with Mr Scalzo I’m not going to allow that [recording into evidence]”² Tr 23

2 When the solicitor attempted to argue with the trial judge about his ruling that the tape recording was not admissible, the judge responded “I have ruled I need no further argument” Tr 23 – 24 Later, after the judge had ruled, the solicitor placed her “wiretap” exception argument on the record in more detail The judge simply responded to the solicitor’s position, after he had already ruled, by stating “I’m saying *that if that s the situation*, I’m saying that does not qualify for the exception under §(C) 17-30-30” Tr 29 (emphasis added)

3 Thus, summary dismissal of the solicitor’s appeal, or summarily vacating the trial judge’s order, would not be appropriate under these circumstances given this record Further, the state’s present argument on appeal is procedurally barred The state does not get “two bites at the apple” on the issue of the admissibility of the tape recording

4 The Attorney General’s present argument that under S C Code § 17-30-110 that this motion should have been made before this Court was not made by the solicitor at the trial level The solicitor could not argue before Judge Pyle at the circuit court level that the tape recording was admissible under the wiretap statute, and now argue that the state’s wiretap argument should have

¹ The pre-trial hearing transcript contained only page numbers, not the lines to cite

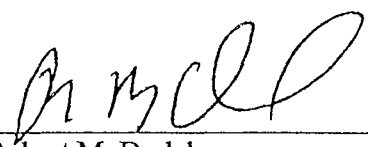
been heard before this Court. The state had the obligation to inform the trial judge that the present suppression issue should be argued before this Court, and not before him if that was the position of the state at the time. In the context of this case, this is an attempt to have “two bites at the apple,” and it constitutes impermissible “sandbagging” of the trial judge. See State v. Torrence, 305 S C 45, 64, 65 406 S E 2d 315, 325, 326 (1991), State v. Terry, 339 S C 352, 529 S E 2d 274, 279 (2000) (Finney C J, dissenting)

4 Respondent respectfully submits the proper procedure would be to allow full briefing on the solicitor’s appeal. Moreover, and importantly, the suppression of the tape recording by the trial judge is not going to substantially impair the state’s ability to prosecute respondent in this case since the child is going to obviously testify anyway. See State v. Belviso, 360 S C 112, 600 S E 2d 68 (Ct App 2004), State v. Abdullah, 357 S C 344, 592 S E 2d 344 (Ct App 2004), State v. McKnight, 287 S C 167, 168, 337 S E 2d 208, 209 (1985), State v. Henry, 313 S C 106, 108, 432 S E 2d 489, 490 (Ct App 1993). Any argument to the contrary by the state should be heard after full briefing, and not by way of a motion for summary disposition.

WHEREFORE, respondent respectfully submits that the Attorney General’s motion to summarily vacate the order of Judge Pyle, and dismiss the solicitor’s appeal, should be denied and full briefing ordered.

² While defense counsel did not cite Rule 106, SCRE, it is clear that his argument involved this rule of completeness, and the context necessary for fundamental fairness.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

Attorney for Respondent

This 13th day of May, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable C Victor Pyle, Jr , Circuit Court Judge

STATE OF SOUTH CAROLINA,

APPELLANT,

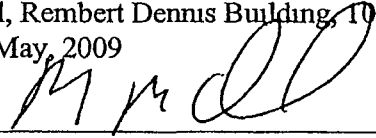
V

SAMUEL L WHITNER,

RESPONDENT

CERTIFICATE OF SERVICE

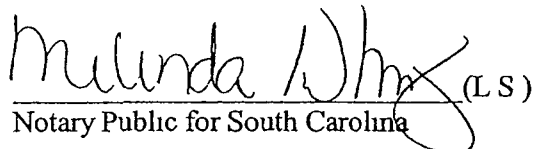
The undersigned attorney hereby certifies that a true copy of the Return to the Motion to Vacate Order and Allow Motion to be Served and Filed Pursuant to Section 17-30-110 in the above referenced case has been served upon opposing counsel, William M Blich Jr , Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm 519, Columbia, SC 29201, this 13th day of May, 2009



Robert M Dudek
Deputy Chief Appellate Defender for Capital Appeals

Attorney for Respondent

SUBSCRIBED AND SWORN TO before me
this 13th day of May, 2009

 (L S)
Notary Public for South Carolina

My Commission Expires October 30, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Greenville County
Hon C Victor Pyle, Jr , Circuit Court Judge

The State,

Appellant,

v

Samuel Lamont Whitner,

Respondent

REPLY

Appellant, The State, through its undersigned counsel, would respectfully show unto this Court as follows

I

Appellant did make the initial motion prior to receipt of the transcript and upon reliance on the recollection of the solicitor. Upon receipt of the transcript, the State immediately filed a copy with the Court and served a copy on opposing counsel. The State asked in its letter to the Court dated April 15, 2009, that the Court consider the transcript as an exhibit to its original motion. The transcript and, especially the initial colloquy regarding the recording beginning on page 18 of the transcript, indicates the central issue at the hearing was whether the tape should be suppressed under the wiretap statute, sections 17-30-10 et seq of the South Carolina Code.

II

Respondent's initial statement to the court indicates he maintained the recording was improperly made under the wiretap statute. Specifically, he states

What it is is a telephone conversation that takes place between the defendant and his daughter, who is the victim in this case. That phone conversation was recorded by, I believe, the stepfather. He takes a little mini cassette recorder and holds it to the end of another phone line while the conversation is going on and records that telephone conversation. (T 18)

The court then asks the basis for introducing the recording and subsequently questions "What right does that person have to unknowingly record the conversation?" (T 18). Clearly, the court is considering this as an illegal recording under the wiretap statute which means any hearing on the issue should have been conducted pursuant to section 17-30-110.

III

The State clearly discussed the wiretap statute and the doctrine of vicarious consent for admissibility of the recording under the wiretap statute. In response, Respondent mentions on page 22 the fact the recording is one of several conversations and would be out of context, but then immediately argues the recording was unlawful under the wiretap statute. In reference to page 23 of the transcript, Respondent argues

I think that in itself it is a demonstration of what's going on. It is not the parent vicariously giving permission so that they can protect the child from any potential harm that might come out of the conversation. I think what you have is that the parents knowing what they ultimately want out of this conversation, taping the conversation, using the child in hopes that they will get something that they can take to the police to use as leverage. I think that's what the Statute was intended to do. You just can't wiretap someone's conversation without the permission of somebody that's — (T 23)

Respondent specifically references the intent of the statute and the only statute he could be referring to is the wiretap statute. His argument is clearly an argument being made pursuant to section 17-30-110(A)(1) of the South Carolina Code alleging the communication was unlawfully intercepted.

IV

The court interrupted his argument on the wiretap statute and found, "I agree with Mr. Scalzo. I'm not going to allow that." His ruling, especially when juxtaposed to the question the court asked on page 18 of the transcript, demonstrates the court suppressed the recording as a violation of the wiretap statute. Later, the court clarified his ruling and made it abundantly clear he was ruling the tape was suppressed under the wiretap statute.

THE COURT: That's fine. But, ma'am, I want it understood you're telling me that the recording party was the stepfather?

MS. SUSTAKOVITCH: Yes, sir. The State has researched at length —

THE COURT: And that while his stepdaughter was talking on the phone to her birth father, that he goes to another telephone and picks up and records.

MS. SUSTAKOVITCH: Yes, sir.

THE COURT: I'm saying that if that's the situation, I'm saying that that does not qualify for the exception under Section (C) 17-30-30 (T 29).

V

Section 17-30-110 specifies the sole means to suppress the contents of any intercepted wire, oral, or electronic communication. Specifically, the section provides

(A) 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 therefrom, on the grounds that the**

(1) communication was unlawfully intercepted,

(2) 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 motion must be made before the trial, hearing, or proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion **The motion must be made before the reviewing authority and must be decided on an expedited basis**

S C Code Ann § 17-30-110(A) (Supp 2007) (emphasis added) Respondent's argument for suppression, and the court's ruling suppressing the recording, clearly had to fall under 17-30-110(A)(1) because no order authorizing the interception was involved in this case

VI

Respondent maintains the State is procedurally barred from making this motion because we failed to raise the issue before the trial court. However, the issue in the State's motion relates to the subject matter jurisdiction of the circuit court to hear the motion to suppress under the wiretap statute. Subject matter jurisdiction cannot be waived by either party, even with consent, and can be raised at any time, including by the court *sua sponte*. See State v. Gentry, 363 S C 93, 100, 610 S E 2d 494, 498 (2005) (citing Brown v. State, 343 S C 342, 540 S E 2d 846 (2001)). Further, in Brown, the Supreme Court specifically found its review of the issue of subject matter jurisdiction is **not** precluded or barred on procedural grounds. See Brown, 343 S C at 346-47, 540 S E 2d at 849 (citing Carter v. State, 329 S C 355, 362, 495 S E 2d 773, 777 (1998) (finding issue of subject matter jurisdiction may be raised at any time), Anderson v. Anderson, 299 S C 110, 115, 382 S E 2d 897, 900 (1989) (the jurisdiction of a court over the subject matter of a proceeding is fundamental))

VII

Section 17-30-110(A) requires Respondent to make the motion to suppress before the "reviewing authority," which is defined by section 17-30-15(9) of the South Carolina Code

(Supp 2007) to mean ‘a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals’ The express language of the statute requires that the motion “**must be made before the reviewing authority**” Therefore, the statute clearly grants subject matter jurisdiction to hear the motion to suppress only to the ‘reviewing authority,” and does not allow the trial court to hear such a motion

As a result, the trial court in this case did not have jurisdiction to hear a motion to suppress the recording of a communication under this Act The jurisdiction to hear the motion to suppress was reserved to the “reviewing authority” by section 17-30-110, and the trial court’s order suppressing the recorded communication under the wiretap statute should be vacated Respondent should be required to serve and file the motion to suppress pursuant to the requirements of section 17-30-110

VIII

The State properly filed this appeal under the holding of State v. McKnight, 287 S C 167, 168, 337 S E 2d 208, 209 (1985) (finding a “pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S C Code Ann § 14-3-330(2)(a) (1976)”) The suppression does not have to render prosecution impossible, it must “significantly impair” the prosecution and effectively determine the action

As the solicitor expressed at the hearing, the suppression of the recording, which is the main evidence implicating Respondent aside from the testimony of the victim, would seriously and significantly impair the prosecution of this case (T 32) Further, the State argues a finding that the appeal may or may not meet the requirements of McKnight is not necessary because the issue being raised in this motion relates to the subject matter

jurisdiction of the court to hear the suppression motion. As stated above, procedural requirements do not prevent the review of the issue of subject matter jurisdiction. See Brown, 343 S C at 346-47, 540 S E 2d at 849

IX

In order to prevent an unnecessary delay of the trial, the State further requests Respondent be given thirty days from the date of this Court's order in which to serve and file a motion to suppress pursuant to section 17-30-110 if Respondent still wishes to move to suppress the recorded communication.

WHEREFORE, the State again respectfully asks this Court for an order vacating the oral ruling of the trial court or, in the alternative, an order remanding the case to the trial court for the purpose of entering an order vacating the oral ruling. Additionally, the State respectfully asks the Court to require Respondent within thirty days of this Court's order to properly serve and file the motion to suppress, if he chooses to so move, with the "reviewing authority" as required by section 17-30-110. Finally, the State continues its request that all deadlines be held in abeyance pending a ruling on the State's motion.

Respectfully submitted,

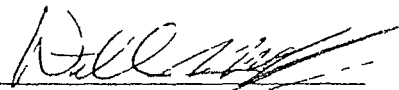
HENRY DARGAN McMASTER
Attorney General

JOHN W MCINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
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WILLIAM M BLITCH, JR
Assistant Attorney General

ROBERT M ARIAIL
Solicitor, Thirteenth Judicial Circuit

BY 
William M Blitch, Jr
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT

May 14, 2009

A rectangular stamp with the word "ORIGINAL" in a bold, sans-serif font, tilted slightly upwards to the right.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Supplemental Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings "

June 23rd, 2011

A handwritten signature in black ink, appearing to read "R M Dudek", written over a horizontal line.

Robert M Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S C 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Appeal from Greenville County
John C. Few, Circuit Court Judge

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JUN 23 2011

THE STATE,

S.C. Supreme Court

RESPONDENT,


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SAMUEL L. WHITNER,

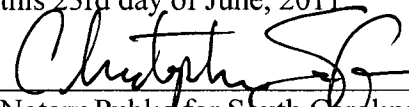
APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the Supplemental Record on Appeal in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 23rd day of June, 2011


for:
Anna Lacke
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 23rd day of June, 2011

 (L.S.)
Notary Public for South Carolina

My Commission Expires May 16, 2021