

The South Carolina Court of Appeals

Peter G. Oliver, Plaintiff,

v.

The University of South Carolina, Martin Goodman, and
Nancy Williamson, Defendants.

Appellate Case No. 2016-002040

ORDER

Martin Goodman has filed a motion pursuant to the South Carolina Homeland Security Act (the Act)¹ to suppress an audio recording of a conversation he had with Earl Gregorich, arguing the audio recording violated the Act because it was made without his consent and he had a reasonable expectation of privacy at the McDonald's restaurant where the conversation took place.

The Act prohibits "[t]he interception of wire, electronic, or oral communications" except "in the manner permitted by this chapter." § 17-30-10. "The . . . Act is violated when a person intercepts oral communications that are not otherwise exempt from or subject to an exception contained in section 17-30-30." *State v. Whitner*, 399 S.C. 547, 553, 732 S.E.2d 861, 864 (2012).

"'Oral communication' means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication." §

¹ S.C. Code Ann. § 17-30-10 to -145 (2014). This court reviews motions to suppress under the Act in its original jurisdiction. *See* S.C. Code Ann. § 17-30-110(A) (2014) (providing such motions "must be made before the reviewing authority"); S.C. Code Ann. § 17-30-15(9) (2014) (defining "[r]eviewing authority" as "a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals").

17-30-15(2). "'Intercept' means 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." § 17-30-15(3). "'Aural transfer' means a transfer containing the human voice at any point between and including the point of origin and the point of reception." § 17-30-15(19).

"Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, electronic, or oral communication other than: (a) any telephone or telegraph instrument, equipment, or facility, or any component thereof . . . (ii) being used by a provider of wire or electronic communications service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of his duties; or (b) a hearing aid or similar device

§ 17-30-15(4).

Because the Act "is patterned after Title III of the Omnibus Crime Control and Safe Streets Act of 1968" (the Federal Act), we look to relevant case law interpreting the Federal Act for guidance. *State v. Guerrero-Flores*, 402 S.C. 530, 534, 741 S.E.2d 577, 580 (Ct. App. 2013) (recognizing "federal cases analyzing comparable provisions of the Federal Act are persuasive in interpreting the provisions of the [Act]"). Furthermore, it is not uncommon for the Federal Act to be considered in the civil context. *See Huff v. Spaw*, 794 F.3d 543 (6th Cir. 2015) (considering the Federal Act in the context of a civil case involving private citizens).

Under the Federal Act, "'oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication." 18 U.S.C.A. § 2510(2) (2015).

"[E]lectronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than-- (a) any telephone or telegraph instrument, equipment or facility, or any component thereof . . . (ii) being used by a provider of wire or electronic communication service in

the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties; (b) a hearing aid or similar device

18 U.S.C.A. § 2510(5) (2015).

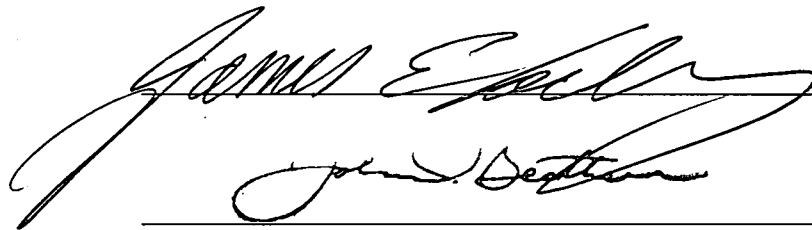
In *Katz v. United States*, Justice Harlan, in a concurring opinion, articulated a reasonable expectation of privacy test. 389 U.S. 347, 361 (1967). Justice Harlan stated,

As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.' My understanding of the rule that has emerged from prior decisions is that *there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'*

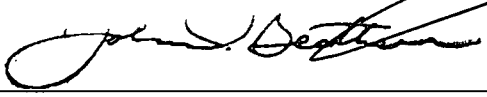
Id. (emphasis added).

We find Goodman did not have an objectively reasonable expectation of privacy. First, we note, Anthony Vaughn, a private investigator, used a basic recorder without an amplification device. Second, the meeting occurred during the day at a McDonald's restaurant that is a part of a truck stop just off I-26. Goodman's own words—" [t]he constant 'coming and going' of other patrons," and "a 'litany' of conversations involving other patrons,"—paints a picture of a busy McDonald's. *See United States v. Mankani*, 738 F.2d 538, 544 (2d Cir. 1984) (noting a hotel room has a transitory nature to it, and as such, a person's justifiable expectation of privacy in a hotel is limited). Third, at the time of their meeting Goodman and Gregorich were aware that a man—who was later identified as Vaughn—sat at a table next to their table. According to Goodman and Gregorich, Vaughn's table was approximately two to three feet from their table. Fourth, Goodman does not state whether he took any actions to prevent his voice from being overheard. *See Kee v. City of Rowlett*, 247 F.3d 206, 213–15 (5th Cir. 2001) ("Primarily, courts have looked to considerations such as (1) the volume of the communication or conversation; (2) the proximity or potential of other individuals to overhear the conversation; (3) the potential for communications to be reported; (4) the affirmative actions taken by the speakers to shield their privacy; (5) the need for


technological enhancements to hear the communications; and (6) the place or location of the oral communications as it relates to the subjective expectations of the individuals who are communicating." (footnotes omitted)); *id.* at 216 (stating the appellants "adduced no evidence regarding the context of the communications that they now seek to characterize as private" and "the failure to include this information in their affidavits undermines any claim of an expectancy of privacy"). Based on the above reasons, we find Goodman was aware his conversation was within earshot of other individuals and thus, he had no reasonable expectation of privacy. *See United States v. McLeod*, 493 F.2d 1186, 1188 (7th Cir. 1974) ("We agree with the Second Circuit that 'conversations carried on in a tone of voice quite audible to a person standing outside . . . are conversations knowingly exposed to the public.'" (alteration in original) (quoting *United States v. Llanes*, 398 F.2d 880, 884 (2d Cir. 1968))). Accordingly, we deny Goodman's motion to suppress.²



C.J.



J.



J.

Columbia, South Carolina

FILED

December 22, 2016

² Goodman further requests that this court exclude the audio recording as a sanction for discovery conduct alleged to have been committed on plaintiff's behalf. As noted previously, this court reviews this motion to suppress pursuant to its charge under the South Carolina Homeland Security Act. *See* S.C. Code Ann. § 17-30-110(A) (2014) (providing such motions "must be made before the reviewing authority"); S.C. Code Ann. § 17-30-15(9) (2014) (defining "reviewing authority" as "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 Act does not extend this court's jurisdiction to arguments unrelated to the Act. Because Goodman's motion to suppress the audio recording as a discovery sanction does not fall within the purview of the Act, we find this issue, as well as Goodman's request for all discoverable materials, is not properly before the court.

cc:

Ryan Kyle Hicks, Esquire

Lake Eric Summers, Esquire

J. Lewis Cromer, Esquire