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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

ANTHONY BERNARD CHAPMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001230

SUPPLEMENTAL APPENDIX

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POST-TRIAL TRANSCRIPT DATED OCTOBER 31, 20141

**THE FOLLOWING EXHIBIT IS ON FILE WITH THIS COURT:
APPLICANT'S EXHIBIT #9 (VIDEO) IT IS LISTED AS COURT'S #1 IN THE
TRANSCRIPT HOWEVER IT WAS MARKED AS AN APPLICANT'S EXHIBIT**

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF GENERAL SESSIONS

3 The State,)
4 -vs-) TRANSCRIPT OF RECORD
5 Anthony B. Chapman,) 2010-GS-42-667,668,669
6 Defendant.) October 31, 2014
7 Spartanburg, South Carolina

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B E F O R E:
HONORABLE J. DERHAM COLE, JUDGE

A P P E A R A N C E S:
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Motion -- page 3.

No sworn testimony; no exhibits entered into evidence.

1 MR. GHENT: May it please the Court, Your Honor. I
2 was merely going to state that this is the defendant's
3 motion. He will have the burden.

4 THE COURT: All right. Mr. Wilkes, you represent
5 Mr. Chapman?

6 MR. WILKES: I do Your, Honor.

7 THE COURT: All right. Your motion.

8 MR. WILKES: May it please the Court.

9 The defendant was convicted by guilty plea in 2010.
10 when he was transported to Kirkland he was able to use the
11 research library and quickly discovered that he had pled
12 guilty to a charge that he had defenses to.

13 He believed that that raised an issue as to the free
14 and voluntary nature of his plea, and he filed a timely
15 posttrial motion.

16 The posttrial motion disappeared into files in the
17 clerk's office because it was wrongfully titled motion for
18 reconsideration under Rule 59.

19 We had a P.C.R., and I represented him in the P.C.R.
20 case. This issue of the unresolved posttrial motion came
21 up in the P.C.R. case.

22 The attorney general and I argued the issue at that
23 time, and Judge Couch determined and ruled -- and there is
24 an order finding that his motion should be considered a
25 valid Rule 29 motion for new trial and that he's entitled

1 to a hearing before the plea judge, which is Your Honor.

2 So Judge Couch has held the P.C.R. ruling in abeyance
3 until the hearing on the Rule 29 motion. And I did not,
4 obviously, file the Rule 29 motion. But I will articulate
5 it because once I become his attorney of record -- and
6 seems I'm his attorney of record for everything.

7 So his motion did fairly well articulate that he had
8 been -- discovered that he had been deprived of knowledge
9 as to a constitutional violation in his case, that the
10 officers in the case used evidence or obtained evidence
11 which was unlawful under the constitution and his
12 constitutional rights were violated.

13 Upon research it appears that he does, in fact, have a
14 valid argument. In this case officers infer -- a
15 confidential informant at the request of law enforcement
16 entered his residence with a video camera concealed and an
17 audio-taping device, which they used while they were in his
18 residence. That was the basis of the later search warrant
19 and his arrest and his ultimate prosecution.

20 Research reveals -- and it is referred to in Wigmore
21 on Evidence, Chapter 75, Rules of Absolute Exclusion, that
22 an issue exists between states, and it varies from state to
23 state, on whether or not it is legal for the police to use
24 electronic taping devices, video and recording, and to send
25 somebody in knowingly to somebody's residence for the

1 purpose of gaining evidence against them.

2 The most articulate case on the issue is a West
3 Virginia case. It is State vs. Mullins. It's 221, W.Va.
4 7.

5 Mullins goes through and does a complete analysis,
6 state by state, on whether states have a Title Three
7 similar state statute on taping and video recording.

8 And the analysis goes through, and it sets forth that
9 it is pretty clear under U.S. vs. White. The Supreme Court
10 said the Fourth Amendment doesn't protect against that.
11 But states have constitutional provisions that have
12 actually said we grant more protection than the Fourth
13 Amendment and that the right to privacy in the home is so
14 special that it gets a heightened sense of protection under
15 the state constitution.

16 There appears -- my counting -- and Mullins sets forth
17 the actual breakdown in great detail -- but by my count
18 it's split between the states that have actually addressed
19 it as to whether their constitutions grant more protection
20 than the Fourth Amendment.

21 I haven't seen where that has been resolved in South
22 Carolina. There is South Carolina case law that says
23 there's no protection for one person to tape a phone call
24 of another. We have that rule set by the Supreme Court.
25 But that is different from the rule as to actually going

1 into the privacy of the person's home.

2 The -- the basis on which states appear to be granting
3 that greater protection, the language best cited is it is
4 based on a deeply-rooted legal and social principles that
5 the coveted privacy of the home should be especially
6 protected and freedom of speech is undermined where people
7 fears the unconstrainedly in whether they're supposed in
8 the privacy of their own home.

9 So the question becomes -- and I don't think it's been
10 answered in this state -- but the question becomes do we go
11 as far as, say, West Virginia in saying South Carolina
12 Article One, Section Ten, does it grant the same or more
13 protection than the Fourth Amendment as did Article Three,
14 Section Three through Six, of the West Virginia
15 Constitution.

16 I compared the language in those sections where West
17 Virginia says that they grant more protection. And our
18 statute is essentially identical to theirs except ours even
19 adds greater protection because we have the language about
20 the privacy interest in Article One, Section Ten.

21 So, arguably, Mr. Chapman's motion is correct in that
22 the evidence was excluded if South Carolina grants that
23 higher level of protection, which in comparison to West
24 Virginia's code or their statutes and their constitution,
25 it would look like we should.

1 If that's the case, he entered a guilty plea not being
2 aware of the fact that they could not have prosecuted him.
3 His plea therefore would not be free and voluntary. And he
4 made the timely motion according to Judge Couch's order
5 that Your Honor should be able to consider under Rule 29.

6 I can put him on the witness stand to ask him the
7 basic questions. I don't think they're contested. He did
8 file the timely motion. It says what he what it says.

9 So, obviously, I think it's a given that he did, in
10 fact, get to Kirkland and realize with some research that
11 he may, in fact, have entered a plea involuntarily. And I
12 can put him on the stand for him to testify to that if that
13 is a critical issue.

14 THE COURT: He did that research within ten days after
15 his entry of a guilty plea?

16 MR. WILKES: He did indeed, and he actually filed the
17 motion timely, which was pretty -- it was pretty
18 impressive.

19 THE COURT: All right. Mr. Ghent, you're representing
20 the state?

21 MR. GHENT: Yes, sir. May it please the Court.

22 Could the record reflect I'm showing Mr. Wilkes a copy
23 of the motion to make sure that is the motion? At this
24 time I would ask to have it marked for identification as a
25 court's exhibit.

1 THE COURT: Well, it's already in the record, isn't
2 it? It was filed.

3 MR. GHENT: I wanted to make sure because I was about
4 to read from it. May I approach?

5 THE COURT: Sure.

6 MR. GHENT: Is that the same motion Your Honor has?

7 THE COURT: Well, I don't have it.

8 MR. WILKES: That is, I believe, his hand --

9 THE COURT: Oh.

10 MR. WILKES: His motion is captioned --

11 MR. GHENT: Motion for reconsideration.

12 MR. WILKES: If I may approach, I'll pass up Judge
13 Couch's order where he --

14 THE COURT: I have that.

15 MR. WILKES: You have that.

16 MR. GHENT: May I proceed, Your Honor?

17 THE COURT: Yes, sir.

18 MR. GHENT: Your Honor, the -- and I'd like to take
19 just a moment to put this in chronology and perspective.

20 Mr. Wilkes is a very fine appellate attorney. I've
21 done appellate work once or twice. I seem to recall that
22 mark of a good appellate attorney is he takes the issue
23 that was before the trial court, briefs an issue that is
24 secondary to what was before the trial court and then
25 argues a third issue before the appellate court.

1 In this case, in all deference and respect to
2 Mr. Wilkes -- again, he's a fine appellate attorney -- I
3 think that's basically what is before the Court.

4 So if I may go through, this is the chronology and the
5 substance to what is before the Court.

6 Number one, October 5th, 2010, this defendant entered
7 a plea of guilty and was sentenced for possession with
8 intent to distribute cocaine, received 20 years; marijuana,
9 five years; trafficking in cocaine 20 years.

10 Number two, he filed a Rule 59(e) motion, which is a
11 civil motion, but Mr. Wilkes is correct. It was construed
12 by Judge Couch as sufficiently being a Rule 29(a) motion.
13 That was filed July 18th. Excuse me. The P.C.R. -- there
14 was no appeal taken. He filed the motion. No appeal was
15 taken. Then he filed a P.C.R. in 2011. It was the P.C.R.
16 where Judge Couch encountered the issue of what was
17 presented in his motion and said that it should be heard
18 before the P.C.R. went forward or continued.

19 As Mr. Wilkes argues, that creates a conundrum in that
20 there was a matter of the appeal and the P.C.R. and the
21 motion.

22 But here is where I take issue, which, over what is
23 before the Court. Reading now from a copy of the guilty
24 plea which Your Honor also has, the Court at Rule 91 -- of
25 the guilty plea, page 91 -- excuse me -- stated, "And you

1 understand that prior to this process that's taking place
2 now that we had a hearing, that your lawyer made a motion
3 to exclude the admissibility of any statements that you
4 made that might incriminate yourself or tend to prove your
5 own guilt."

6 In the next paragraph the judge says, "Your lawyer
7 also made a motion to suppress the evidence that was
8 obtained as a result of the search of your residence, he
9 claiming that there was something wrong with the search
10 warrants."

11 Now, "After considering all of the evidence presented
12 during that hearing I determined" -- this is the Court --
13 "that the statements were voluntarily made, and therefore I
14 determined that they could be admitted in the trial of the
15 case if your case went to trial before a jury."

16 At page two it continues on where the judge makes
17 clear -- page 92, last full paragraph on that page -- "when
18 you plead guilty you give up your right to contest the
19 decisions that I have made. In other words, you waive your
20 right to contest any illegal search and seizure. You give
21 up your right to contest my decision about the admission of
22 those statements."

23 Now, with respect to what learned counsel is doing, he
24 is cutting to the substance of the argument that someone
25 would have, could have, should have, might have made, and

1 it's not before the Court. It was not before the original
2 Court.

3 At this time reading if I may, Your Honor, from the
4 motion what is actually raised in the second full paragraph
5 if I might quote again, "On Tuesday, October 5th, 2010, the
6 defendant reluctantly pled guilty to the charges of
7 trafficking crack cocaine, possession of cocaine with the
8 intent to distribute and manufacturing marijuana. The
9 defendant believes this Honorable Court should invest --
10 investigate the malicious prosecutorial conduct by the
11 Spartanburg County Sheriff's Office" -- a mixed metaphor --
12 "in procuring the evidence used against the defendant,
13 arrest and ultimate guilty plea rendered. No supporting
14 probable cause previously existed to give the arresting
15 officers authorization to utilize an undercover informant
16 that was wired during multiple conversations with the
17 defendant," as Mr. Wilkes has pointed out. West Virginia
18 is West Virginia; South Carolina is South Carolina.

19 There are two recent decisions which I don't have it
20 in my fingertips that have inter -- interpreted South
21 Carolina's Article One, Section Ten.

22 One of them specifically distinguished it from the
23 Fourteenth Amendment due process rights by saying that
24 South Carolina does not grant some additional right to
25 inform an individual, once again, that he has a right to

1 withdraw consent once it's been given.

2 One of the most notable passages that is in our
3 Article One, Section Ten, which indeed does give a more
4 specifically stated right to privacy, is that section does
5 state there is a right to privacy.

6 However, the case that Mr. Wilkes is relying on,
7 again, it is a West Virginia case which does note that that
8 is not a principle of Fourteenth Amendment due process.
9 It's West Virginia interpreting its own statute and its own
10 constitutional provision.

11 The next paragraph, "The defendant also believes his
12 due process and Fourteenth Amendment rights were violated
13 in that the evidence used was illegally obtained. The
14 county officers must use county funds to make a controlled
15 buy, and this was not done, although the search warrants
16 used against the defendant indicate that county funds were
17 used. The defendant was not afforded the documentary
18 evidence to substantiate the claim that the county used its
19 own funds, nor is this on file at the clerk of court. By
20 this action alone the defendant believes that the county
21 magistrate was deliberately misled in issuing a search
22 warrant for the case.

23 Your Honor, with respect to that point, first of all,
24 there is no right. And there is a recent case in South
25 Carolina, State vs. Rice, which makes clear there is no

1 right in this state to a conditional guilty plea. There is
2 no right to plead -- to appeal a guilty plea.

3 This gentleman waived rights, entered a guilty plea
4 and then filed a motion basically for a retrial, which the
5 Court said I'll let him hear it -- I will have it heard.
6 But that's not going to grant a right to an appeal that
7 does not exist.

8 Secondly, Your Honor, as to the claim of due process,
9 Fourteenth Amendment not being satisfied because of the
10 money that was used, that is a technical argument that has
11 nothing to do with constitutional rights being violated.

12 It is clear under case law in this state and the
13 United States Supreme Court. I would cite the Court to
14 State vs. Sachs, S-A-C-H-S. It's an older case written by
15 Justice Bubba Ness that makes clear that technicalities do
16 not do it. That is not what a constitutional issue turns
17 upon.

18 But, more importantly, it's either Hasting vs. U.S. or
19 U.S. vs. Hasting. And here I apologize, Your Honor. I am
20 somewhat drawing on memory. But Hasting vs. U.S. says it's
21 a case that the U.S. Supreme Court corrected a Fifth
22 Circuit Opinion, a Fifth Circuit Court of Appeals Opinion,
23 that stated that in order to have some sort of sanctions in
24 a criminal prosecution that uses something such as the
25 exclusionary rule you have to have a constitutional

1 violation to hang your hat on. Here there is not -- there
2 is no constitutional violation.

3 what was done, if it was done -- and there is no
4 evidence of that -- would be a technical statutory
5 violation of South Carolina state law. That does not
6 create a constitutional violation. And, again, there is no
7 appeal from a guilty plea in South Carolina. Thank you,
8 Your Honor.

9 MR. WILKES: May it please the Court.

10 THE COURT: Yes.

11 MR. WILKES: There is an appeal from a guilty plea.
12 It's very limited, very limited.

13 But the issue is he did articulate a constitutional
14 violation. And there is a basis for what he has
15 articulated as being constitutional violation.

16 The question is has South Carolina addressed it. To
17 my understanding it has not. The cases addressing the
18 similarities in the article in the Fourteenth Amendment are
19 those dealing with telephone contact. In other words,
20 telephone call. Vastly different from the question that we
21 present. It's long been the law that a -- we have one
22 party consent to telephone calls.

23 The question is does the same scenario of going into
24 someone's house create greater protection because of the
25 fact that the home has that special privacy interest. And

1 that is the basis that he has that is a valid
2 constitutional question. And it has not been answered as
3 far as I know in this state. It has been answered in
4 numerous states with some states interpreting their state
5 statute more protective than the Fourteenth Amendment, some
6 state judiciaries interpreting it far less.

7 There was even one -- Montana maybe. I'm not sure.
8 One actually interpreted it as having more protection, and
9 the legislature went back and changed and said it's equal
10 to the Fourteenth Amendment, but the bottom line being it's
11 dependent upon the judiciary's interpretation of the
12 protections inherent in Article -- for us it is Article
13 One, Section Ten, which is almost identical to what West
14 Virginia interpreted with the additional privacy
15 protections.

16 And I commend the Court to the West Virginia analysis,
17 not its authority but its analysis, of each state, each
18 case, the languages and the interpretations given. If we
19 are on par with those other states he would be correct. It
20 would be a constitutional violation to send a confidential
21 informant into someone's house wired to engage in
22 conversations to gain criminal evidence against them.

23 THE COURT: Do you have a copy of that case submitted?

24 MR. WILKES: I do, yes, sir.

25 THE COURT: Okay. Anything else?

1 MR. WILKES: No, sir, Your Honor.

2 THE COURT: All right. I'll review the record and
3 read the law and issue an order.

4 END OF REQUESTED TRANSCRIPT OF RECORD

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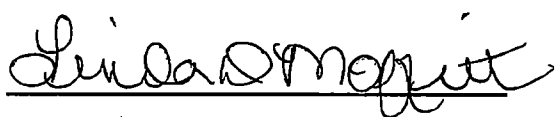
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 31st day of October 2014.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

April 19, 2017



Linda D. Moffitt
Circuit Court Reporter