

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RETURN TO MOTION TO SUPPRESS EVIDENCE
OCONEE COUNTY
Court of General Sessions

Case Number 2016-GS-37-00632

The State of South Carolina,

Plaintiff,

v.

Billy Christopher Whitmire,

Defendant.

RETURN IN RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

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RECEIVED
JUN 11 2018
SC Court of Appeals

STATEMENT OF RESPONSE TO ISSUE(S)

- 1. THE SOUTH CAROLINA HOMELAND SECURITY ACT (WIRETAP ACT), S.C. CODE ANN. §17-30-10 *et. seq.* (Supp. 2010) DOES APPLY TO INTERCEPTED RECORDED TELEPHONE CONVERSATIONS IN A CRIMINAL CASE REGARDING DOMESTIC VIOLENCE.**
- 2. THE SOUTH CAROLINA HOMELAND SECURITY ACT (WIRETAP ACT), S.C. CODE ANN. §17-30-30 *et. seq.* (Supp. 2010) DOES NOT OFFEND THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION OR THE SOUTH CAROLINA CONSTITUTION BECAUSE IT PROVIDES FOR THE EXEMPTION OF CONSENT.**
- 3. THE RIGHT TO PRIVACY AND THE RIGHT AGAINST SELF-INCRIMINATION IN THE S.C. CONSTITUTION ARE NOT VIOLATED WITH THE TAPING OF A TELEPHONE CONVERSATION WITH CONSENT OF ONE OF THE PARTIES.**

STATEMENT OF THE FACTS

Amie Ellison and Defendant Billy Whitmire had been in a 19-year-relationship living together the majority of the time. The couple has two minor children together. On February 4, 2016, Amie decided to separate from the Defendant and left the household. She return to the house the following morning on February 5, 2016 because the Defendant begged her for a ride. When she arrived at the house the Defendant coaxed her into the bedroom, pushed her off the bed, pulled her hair, knocked her head against the wall, struck her, and then choked her. She stayed at the house until he fell asleep and she could make a run for it. She immediately went to the Oconee County Sheriff's Office with her mother and filed a report with Deputy John Towery.

On February 8, 2016, Amie called Oconee County Sheriff's Office and informed law enforcement that her bruises were showing and photos were taken. On February 10, 2016, Sgt. Nina McKee was assigned the case and Amie voluntarily came to the police station to talk with a victim's advocate and Sgt. McKee. After speaking with Sgt. McKee, Amie agreed to make contact with the Defendant by using her own cell phone and a recording device supplied by Oconee County Sheriff's Office. That same day Amie while at the police station placed the call to the Defendant after the recording equipment was hooked up and able to capture the conversation. During this recorded conversation the Defendant answered Amie's call and made numerous statements including "I'm sorry I choked you. I wish I hadn't done that. I'm sorry" and "I'm so sorry I know I choked you I didn't know I hit ya that wasn't me that was rage if I did that." That recorded phone conversation was added to Sgt. McKee's case file. A warrant was issued on February 10, 2016 and the Defendant was arrested the same day for Domestic Violence in the 2nd Degree.

ARGUMENTS

1. THE SOUTH CAROLINA HOMELAND SECURITY ACT (WIRETAP ACT), S.C. CODE ANN. §17-30-10 *et. seq.* (Supp. 2010) DOES APPLY TO INTERCEPTED RECORDED TELEPHONE CONVERSATIONS IN A CRIMINAL CASE REGARDING DOMESTIC VIOLENCE.

The legislative findings at the beginning of the South Carolina Homeland Security Act (herein referred to as Wiretap Act), S.C. Code Ann. §17-30-10 *et. seq.* (Supp. 2010) states clearly that the Wiretap Act was born out of the tragedy of September 11th, 2001 and was enacted in 2002. The Wiretap Act may have been born out of September 11th, 2001, but the Wiretap Act in South Carolina is not limited to just overseas terroristic acts. The legislative findings included domestic concerns for the “peace and safety of our nation...safety of the citizens of South Carolina.” 2002 Act No. 339 Sect. 2. The Wiretap Act was a legislative enhancement created to provide law enforcement and others with the tools to “protect and defend South Carolina and her citizens while preserving individual constitutional rights and liberties.”

Id.

S.C. Code Ann. §17-30-110 of the Wiretap Act is what vests the authority of the judicial panel system with the power to decide the Defendant’s Motion to Suppress. The Wiretap Act applies in our case because we have an “oral communication” as defined in S.C. Code Ann. §17-30-15 as “any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception....” Also “Interception” is defined as “...acquisition of the contents of any...oral communication through the use of any electronic, mechanical, or other device.” *Id.* The Defendant had an oral phone conversation with Amie. Sgt. McKee hooked up a law enforcement owned recorder to Amie’s personal cell phone and it

was audio recorded without the Defendant's knowledge. The call was intercepted and recorded by a "person," which the Wiretap Act says is someone who is an "employee or agent of the State of South Carolina," or also an "investigative or law enforcement officer" as "officer of the State of South Carolina. *Id.* The Wiretap Act encompasses other criminal acts outside of overseas terroristic threats and can include domestic terroristic acts inside the home of South Carolina's citizens.

The South Carolina Supreme Court in *State v. Whitner*, 399 S.C. 547, 732 S.E.2d 861 (2012), applied the Wiretap Act to circumstances outside of overseas terroristic threats by using it in a criminal case of Criminal Sexual Conduct (CSC) with a Minor in the 1st Degree. In *Whitner*, the biological father of the victim was the perpetrator of the CSC. *Id.* at 550, 862. The mother consented to allow the stepfather of the victim to record telephone calls between her and the biological father in order to confront him about the abuse. During the call the biological father admitted to the abuse. *Id.* at 550, 862-863.

Similarly, in our case there is a family relationship between the parties who took part in the phone conversation. The Defendant is the co-habitant of the victim Amie and biological father to their two children. Amie consented to the recording of the telephone call between her and the Defendant in order to confront him about the abuse that occurred several days earlier. During the call the Defendant admitted to the abuse. Although the type of abuse differs the facts are so alike that the Wiretap Act would apply to our case at hand.

2. **THE SOUTH CAROLINA HOMELAND SECURITY ACT (WIRETAP ACT), S.C. CODE ANN. §17-30-30 et. seq. (Supp. 2010) DOES NOT OFFEND THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION OR THE SOUTH CAROLINA CONSTITUTION BECAUSE IT PROVIDES FOR THE EXEMPTION OF CONSENT.**

The South Carolina Homeland Security (Wiretap Act), S.C. Code Ann. §17-30-10 et. seq. (Supp. 2010) begins with the legislature specifically creating it with the intent to preserve “individual constitutional rights and liberties.” 2002 Act No. 339 Sect. 2. The Wiretap Act clearly sets out in S.C. Code Ann. §17-30-30 that:

- (A) It is lawful under this chapter for an officer, employee, or agent of FCC, in normal course of his employment...to intercept a...oral...communication.
- (B) It is lawful under this chapter for a person acting under color of law to intercept a...oral...communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.
- (C) It is lawful under this chapter for a person not acting under color of law to intercept a...oral...communication, where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception.

The South Carolina Wiretap Act is modeled after the Federal Act - Omnibus Crime Control and Safe Streets Act of 1968. *South Carolina v. Whitner*, 399 at 552, 863. The Wiretap Act is only violated when an exemption or exception in S.C. Code Ann. §17-30-30 does not apply. *Id.* at 553, 864. In *United States v. Hodge*, 539 F.2d 898 (6th Cir. 1976), the Defendant challenged an intercepted phone call recorded by a DEA agent between himself and confidential informant claiming that it violated the Fourth Amendment of the U.S. Constitution. However, the United States Court of Appeals held that it was the intent of the Omnibus Crime Act –

...to allow consensual interception of telephone conversations without an authorizing warrant: It shall not be unlawful under the chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given consent to such interception. *Id.* at 904.

The language in the South Carolina Wiretap Act is a mirror to that of the Omnibus Crime Act; therefore, it does not offend the Fourth Amendment of the U.S. Constitution or the South Carolina Constitution. Likewise, factually our case is similar in that like the confidential informant in *Hodge*, Amie, agreed to assist law enforcement with the investigation. The confidential informant hoped for leniency and voluntarily initiated contact with the DEA. *Id.* at 904. Amie voluntarily and on her own accord went immediately to law enforcement for assistance. She came back voluntarily several days later to be photographed. When she was put into contact with Sgt. McKee she agreed to use her own cell phone and place a pre-text phone call knowing and consenting to it being recorded to assist in her case as the victim. In both cases law enforcement equipment was used to perform the actual recordings. In *South Carolina v. Whitner*, 399 S.C. 547, 555, 865, the definition of consent is explained as a broad term in Black's Law Dictionary as "agreement, approval, or permission as to some act or purpose" and can be "express, implied, informed, or voluntary."

In further support the U.S. Supreme Court in *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122 (1971), held that the Fourth Amendment right to be secure against unreasonable searches and seizures was not violated when without a warrant a radio transmitter was given to an informant, concealed on his person by government agents, and relayed back conversations between him and the defendant. The U.S. Supreme Court in *White* recognizes that "...one contemplating illegal activities must realize and risk that his companions may be reporting to the

police. If he sufficiently doubts their trustworthiness, the association will very probably end....” *Id.* at 752, 1126. The case continues to discuss how there is no persuasive evidence that just because someone is electronically equipped that that is enough to require constitutional recognition under the Fourth Amendment which is ruled by reasonableness. *Id.* at 752-753, 1126.

Lastly, the Defendant suggests the need for a court prior to the interception of the phone conversation because the Defendant in our case was unaware it was being made. In *United States v. Barone*, 913 F.2d 46, 48 (2nd Cir. 1990), the U.S. Court of Appeals addressed this when Barone who was charged with tax evasion and perjury gave tape recorded statements to co-defendant who had consented to doing the recording on behalf of the government. The Court held that the tape recording in *Barone* was made without the defendant being aware and without a court order and “because the government made the recording with the consent and cooperation of (co-defendant) there was no need to inform Barone or obtain a court order.” *Id.* at 49.

Likewise in our case the Defendant was not aware of the recording on the phone call, but because Amie consented there was no need for law enforcement to have to obtain a court order.

3. THE RIGHT TO PRIVACY AND THE RIGHT AGAINST SELF-INCRIMINATION IN THE S.C. CONSTITUTION ARE NOT VIOLATED WITH THE TAPING OF A TELEPHONE CONVERSATION WITH CONSENT OF ONE OF THE PARTIES.

The South Carolina Wiretap Act does not offend the Right to Privacy or the Right Against Self-Incrimination. The U.S. Court of Appeals in *United States v. Hodge*, 539 F.2d 898,

905, states "...no one has a constitutionally protected expectation that the person to whom he voluntarily reveals incriminating information will keep it secret, the consensual interceptions permitted under the (Omnibus Crime Act) do not offend the Fourth Amendment." Since the South Carolina Wiretap Act is modeled after the Omnibus Crime Act the same result under the law would apply.

Also in *South Carolina v. Whitner*, 399 S.C. 547, 558, 866-867, the same claim was made that the intercepted phone call was an unreasonable invasion of privacy under S.C. Const. Art. I §10 and the South Carolina Supreme Court disagreed. In *United States v. White*, 401 U.S. 745, 752, 1126 the U.S. Supreme Court also discusses what expectations of privacy are constitutionally justifiable. It states "So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police...." It goes on to say "If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case." *Id.*

The U.S. Supreme Court also addressed whether or not there is a right against self-incrimination when it comes too consented to recorded communications and its stance is as follows:

Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable. An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent. It may also be that with the recording in existence it is less likely that the informant will change his mind..." *White* at 753, 1126.

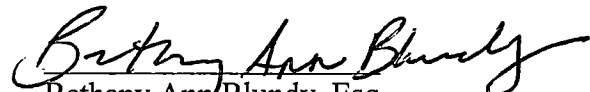
The U.S. Supreme Court acknowledges that this may not favor the defendant but there is no constitutional right to exclude it. *Id.*

CONCLUSION

Therefore, based on the above analysis this Court should deny the Defendant's Motion to Suppress the introduction of the consented to tape recording by one of the parties and discussion of the contents finding that the Wiretap Act does apply, consent by the victim to assist law enforcement in the interception of the recording removes any Fourth Amendment search violations, and hold that it does not offend the Defendant's Right to Privacy or Right Against Self-Incrimination due to the exemption of consent.

June 7, 2018

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the Return on Defendant's Motion to Suppress Evidence on the Defendant by personally delivering a copy of it to the attorney of record, Suzanne E. Earle, Assistant Public Defender, at her office at 110 Browns Square Dr., Walhalla SC 29691, on June 7, 2018, and have filed a copy with the Clerk of Court of Oconee County.

June 7, 2018


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June 7, 2018

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JUN 11 2018

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: The State of South Carolina v. Billy Christopher Whitmire,
Case Number 2016-GS-37-00632

Dear Mrs. Kitchings:

Enclosed for filing is an original and six (6) copies of a Return in Response to Defendant's Motion to Suppress and Proof of Service of the Return on the Defense.

Sincerely,

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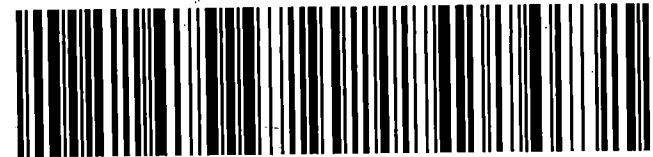
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