

The South Carolina Court of Appeals

Jennifer Renee McMaster, Petitioner

v.

James Michael McMaster, Respondent.

Appellate Case No. 2021-000278

ORDER

Jennifer Renee McMaster (Mother) has filed a motion pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the Federal Act)¹ and the South Carolina Homeland Security Act (the Act)² to suppress all audio and video communications that were intercepted and recorded by James Michael McMaster (Father) through use of a sound-activated "Spy Camera" (the device). Mother argues the recordings violated the Federal Act and the Act because Father did not have a good faith basis to continually record all conversations within earshot of the device.

Mother and Father were married in 2004 and have one child (Child), who was born in 2005. In August 2020, following an incident between the parties in which Mother alleged physical abuse by Father, Mother and Child went to stay with Mother's parents (Grandparents). Subsequently, Father filed a family court action, which is the case underlying this motion. In early September 2020, Father

¹ 18 U.S.C § 2510 to -2523.

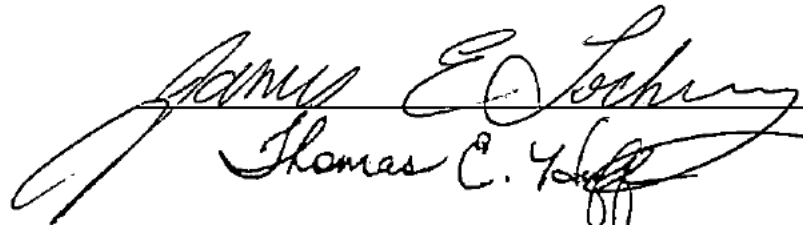
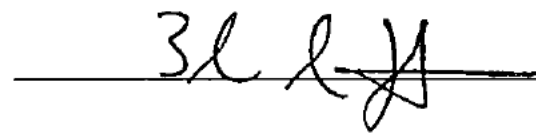
² S.C. Code Ann. § 17-30-10 to -145 (2014). This court reviews motions to suppress under the Act in its original jurisdiction. *See* S.C. Code Ann. § 17-30-110(A) (2014) (providing such motions "must be made before the reviewing authority"); S.C. Code Ann. § 17-30-15(9) (2014) (defining "[r]eviewing 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"); *see also State v. Whitner*, 399 S.C. 547, 553, 732 S.E.2d 861, 864 (2012) ("[T]he Federal Act is substantively the same as South Carolina's Wiretap Act . . .").

installed the device in the marital home to "protect himself against the possibility of false accusations" by Mother and Child and because he was concerned Mother and Grandparents were alienating Child from him. In early November 2020, Father moved out of the marital home and Mother and Child returned to live in the marital home.

The Act prohibits "[t]he interception of wire, electronic, or oral communications" except "in the manner permitted by this chapter." § 17-30-10; *see also* 18 U.S.C. § 2511. "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." *Whitner*, 399 S.C. at 553, 732 S.E.2d at 864. However, "[i]t is lawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic 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." S.C. Code Ann. § 17-30-30(C) (2014); *Whitner*, 399 S.C. at 553, 732 S.E.2d at 864 ("[The] Act parallels the Federal Act passed by Congress in 1968, which similarly permits lawful interception where one party to the communication consents."). Our supreme court has found "the Legislature intended the consent provision [of section 17-30-30(C)] in the [Act] to encompass the vicarious consent of a parent on behalf of a minor child," provided the parent has a good faith, objectively reasonable basis for believing that it was necessary and in the best interest of the child to consent. *See id.* 399 S.C. at 554-56, 560, 732 S.E.2d at 864-65, 867.

We find Father did not have the authority to give Child's consent to intercept her communications. First, we note Mother had custody of Child and exclusive possession of the marital home at the time the communications were intercepted. *See West Virginia Dep't of Health and Hum. Res. ex rel Wright v. David L.*, 453 S.E.2d 646, 654 (W. Va. 1994) (expressly rejecting the father's assertion that as the children's father, he had the authority to give their consent to record under the Federal Act and its West Virginia equivalent, finding the facts before it were different than other vicarious consent cases because the mother had been awarded temporary custody of the children, the recordings occurred in the mother's house, and the father "had absolutely no dominion or control over [the mother's] house where the father procured his mother's assistance to hide the tape recorder"); *Pyankovska v. Abid*, 2017 WL 5505037 at *4 (D. Nev. Nov. 16, 2017) (rejecting the application of the vicarious consent doctrine because although the father had partial custody of the child, he did not have custody of the child at the time the recordings were made); *cf. D'Onofrio v. D'Onofrio*, 780 A.2d 593, 598 (NJ. Super. Ct. App. Div. 2001) (denying a motion to suppress intercepted communications

and emphasizing several factors in its determination including that the conversations were recorded for custody proceedings—"whose very goal was to determine the best interests of the [parties'] four children"—"by the residential custodial parent, in his own home, well into the *pendente lite* period during which significant restrictions had already been placed on [the mother's] interaction with her [children]"). Second, the device Father used was sound-activated and recorded not only audio but video, as well.³ Additionally, the device recorded the kitchen and living room area of the marital home in approximately two-minute intervals every time it picked up noise, thus recording Mother, Child, and whomever was invited into their home physically or via telephone from November 2020 through March 2021 when Mother became aware of the device. Based on the foregoing, we find that although Father's allegations of alienation are concerning, they do not justify the level of invasiveness found in this case. Accordingly, under the specific facts before this court and after careful consideration, Mother's motion to suppress is granted.⁴

 C.J.
Thomas C. Hoff J.
 J.

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³ Mother alleges additional recording devices were found in the home. Although this court considered whether to request Mother provide this court with an affidavit or whether to conduct a hearing to better understand the exact manner in which the communications in the marital home were intercepted, we find this inquiry unnecessary based on Father's admission of the manner he used to intercept Child's communications. Additionally, Mother's request for a hearing is denied. See § 17-30-110(A) ("The reviewing authority may, *in its discretion*, conduct a hearing and require additional testimony or documentary evidence." (emphasis added)).

⁴ Additionally, we deny Mother's request to segregate and seal the intercepted communications. However, nothing in this order prevents the family court from entertaining such a motion. Further, Mother's request for attorney's fees and costs is denied.

Columbia, South Carolina

cc:

Richard Giles Whiting, Esquire

Melissa E. Simondi, Esquire

Rhett Daniel Klok, Esquire

Gregory Samuel Forman, Esquire