IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1118-2

Filed: 17 November 2020

Rowan County, Nos. 17 CRS 974, 51350, 51353, 51412, 51470,

STATE OF NORTH CAROLINA

v.

KENNETH RUSSELL ANTHONY

Appeal by defendant from order entered on 26 April 2018 by Judge Lori I. Hamilton in Superior Court, Rowan County. Heard in the Court of Appeals 8 May 2019, and opinion filed 20 August 2019. Remanded to this Court by order of the North Carolina Supreme Court for further consideration in light of *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019).

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

STROUD, Judge.

Defendant Kenneth Anthony timely appealed from the trial court's order requiring him to enroll in lifetime satellite-based monitoring following his future

release from prison. On 20 August 2019, this Court filed an opinion reversing the trial court's civil order mandating lifetime satellite-based monitoring. *See State v. Anthony*, ___ N.C. App. ___, 831 S.E.2d 905, *remanded for reconsideration*, 373 N.C. 249, 835 S.E.2d 448 (2019). The State subsequently filed a petition for discretionary review with the North Carolina Supreme Court. On 4 December 2019, the Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding to this Court for reconsideration in light of the Supreme Court's decision in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"). Upon reconsideration, we reach the same result as our previous opinion and reverse the trial court's order mandating lifetime satellite-based monitoring.

I. Background

We described the factual background of this case in our prior opinion:

> Defendant entered an Alford plea to attempted first-degree sex offense, habitual felon, assault on a female, communicating threats, interfering with emergency communication, first-degree kidnapping, incest, and second-degree forcible rape. Defendant's charges were consolidated into a single judgment and the trial court imposed a sentence of 216 to 320 months. On the same day judgment was entered, Defendant submitted a motion to dismiss the State's petition for SBM. The trial court held a hearing regarding SBM. The trial court denied Defendant's motion and entered an order directing Defendant to submit to lifetime SBM upon his release from prison. Defendant timely appealed the order requiring him to submit to lifetime SBM.

State v. Anthony, ___ N.C. App. ___, 831 S.E.2d 905, 906-07.

Grady III limited its holding to a particular group of defendants, "recidivists," as defined by North Carolina General Statute § 14-208.6(2b):

> In light of our analysis of the program and the applicable law, we conclude that the State's SBM program is unconstitutional in its application to all individuals in the same category as defendant—specifically, individuals who are subject to mandatory lifetime SBM based solely on their status as a statutorily defined "recidivist" who have completed their prison sentences and are no longer supervised by the State through probation, parole, or post-release supervision. We decline to address the application of SBM beyond this class of individuals.

372 N.C. at 522, 831 S.E.2d at 553 (footnote omitted).

II. Analysis

Defendant was placed on lifetime SBM due to committing a sexually violent offense, his status as a recidivist, and for committing an aggravated offense. Although Defendant was placed on SBM in part due to his status as a recidivist, unlike the defendant in *Grady*, he has not yet completed his prison sentence. Instead, Defendant's SBM will begin no sooner than 18 years after he was sentenced. In addition, the trial court found two additional bases for placing defendant on SBM. Therefore, *Grady III's* holding does not directly control this case, as Defendant was not placed on SBM based *solely* on his status as a "recidivist," but the analysis of the issue described in *Grady III* does apply to this case. *See State v. Griffin*, ___ N.C. App. ___, ___, 840 S.E.2d 267, 273 (2020) ("Although *Grady III* does not compel the result we must reach in this case, its reasonableness analysis does provide us with a

roadmap to get there. As conceded by the State at oral argument, *Grady III* offers guidance as to what factors to consider in determining whether SBM is reasonable under the totality of the circumstances. We thus resolve this appeal by reviewing Defendant's privacy interests and the nature of SBM's intrusion into them before balancing those factors against the State's interests in monitoring Defendant and the effectiveness of SBM in addressing those concerns. (citing *Grady III*, 372 N.C. at 527, 534, 538, 831 S.E.2d at 557, 561, 564.")).

And although Mr. Grady had already completed his sentence when his SBM hearing was held, the order directing Defendant to enroll in SBM will not take effect until after Defendant is released from prison, when he will be in essentially the same position as Mr. Grady. If he is subject to any sort of post-release supervision, his privacy interests will be reduced during that supervision. But once he has served the sentence and completed any post-release supervision, his privacy interests will be the same as Mr. Grady's. *See Grady III*, 372 N.C. at 531, 831 S.E.2d at 559-60 ("This is especially true with respect to unsupervised individuals like defendant who, unlike probationers and parolees, are not on the 'continuum of possible [criminal] punishments' and have no ongoing relationship with the State." (alteration in original)). The primary factual difference between Mr. Grady and Defendant is that Mr. Grady's SBM was to begin immediately, and Defendant's SBM will not begin until eighteen to twenty-six years in the future.

In addition, this case is one of several considered by this Court after *Grady III* addressing a similar issue for defendants sentenced for a crime and simultaneously, or soon after sentencing, ordered to enroll in SBM either for a term of years or for life, with the SBM to begin only after completion of the imprisonment. This Court has already addressed this issue, and we are bound to follow those precedents. *E.g., State v. Gordon*, ___ N.C. App. ___, 840 S.E.2d 907 (2020).

We are unable to distinguish the factual situation of this case, where Defendant will not be released from prison for eighteen to twenty-six years, from *State v. Gordon,* ___ N.C. App. ___, 840 S.E.2d 907 (2020),[1] where the defendant was not eligible to be released from prison for fifteen to twenty years, and *State v. Strudwick*, ___ N.C. App. ___, ___ S.E.2d. ___ (6 October 2020) (No. COA18-794-2), where the defendant was not a recidivist and was not eligible to be released from prison for thirty to forty three years. In *Gordon*, the defendant pled guilty to "statutory rape, second-degree rape, taking indecent liberties with a child, assault by strangulation, and first-degree kidnapping" in February 2017. ___ N.C. App. at ___, 840 S.E.2d at 909. The trial court in *Gordon* determined the defendant was convicted of an "'aggravated offense' under N.C. Gen. Stat. § 14-208.6(1A)" and ordered him to

[1] As was the case in *State v. Hutchens*, we acknowledge, "that, following the Supreme Court's orders temporarily staying this Court's decisions in both *Griffin* and *Gordon*, the precedential value of those decisions is in limbo. While they are not controlling, neither have they been overturned. They are instructive as the most recent published decisions of this Court addressing *Grady III's* application outside the recidivist context[.]" *State v. Hutchens,* ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (16 June 2020) (No. COA 19-787).

enroll in SBM "for the remainder of his natural life upon his release from prison." *Id.* at ___ 840 S.E.2d at 909.

In *Gordon*, this Court fully analyzed the effect of *Grady III* on its reconsideration. *Id.* at ___, 840 S.E.2d at 912-14. Although the defendant in *Gordon* and Defendant in this case were not convicted of the same offenses and there are factual differences in their situations, none of those differences change the legal analysis under *Grady III*. *See Grady III*, 372 N.C. at 522, 831 S.E.2d at 553. One of the factual differences is that defendant's term of SBM will not begin for at least eighteen years, while Gordon's could begin in only fifteen years. *State v. Gordon*, ___ N.C. App. at ____, 840 S.E.2d at 911. This difference only reduces the State's ability to "demonstrate reasonableness" of the SBM since it

> is hampered by a lack of knowledge concerning the unknown future circumstances relevant to that analysis. For instance, we are unable to consider "the extent to which the search intrudes upon reasonable privacy expectations" because the search will not occur until Defendant has served his active sentence. The State makes no attempt to report the level of intrusion as to the information revealed under the satellite-based monitoring program, nor has it established that the nature and extent of the monitoring that is currently administered, and upon which the present order is based, will remain unchanged by the time that Defendant is released from prison.

Id. at ____, 840 S.E.2d at 912–13 (citation omitted).

"Accordingly, we necessarily conclude that the State has failed to meet its burden of establishing that lifetime satellite-based monitoring following Defendant's

eventual release from prison is a reasonable search in Defendant's case. We therefore reverse the trial court's order." *State v. Strudwick*, ___ N.C. App. at ___ S.E.2d. at ___, slip op. at *9 (quoting *State v. Gordon* ___ N.C. App. at ___, 840 S.E.2d at 914).

REVERSED.

Judges HAMPSON and YOUNG concur.

Report per Rule 30(e).