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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-492

Filed: 1 November 2016

Rowan County, No. 09 CRS 51585

STATE OF NORTH CAROLINA

v.

MERRITT CORNELIUS BANKS

Appeal by defendant from order entered 10 December 2015 by Judge Ronald E. Spivey in Rowan County Superior Court. Heard in the Court of Appeals 24 October 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

TYSON, Judge.

Merritt Cornelius Banks (“Defendant”) appeals from an order directing him to enroll in satellite-based monitoring (“SBM”) for the remainder of his natural life. Defendant contends, and the State concedes, the trial court improperly entered the SBM order without receiving any evidence from the State that lifetime SBM was a reasonable search under the Fourth Amendment. We reverse the order, and remand for a new hearing.

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I. Background

On 13 November 2009, Defendant entered an *Alford* plea to seven counts of second degree rape. The victim was a mentally-disabled woman who Defendant had known for about fifteen years. Pursuant to a plea arrangement, the trial court consolidated all of the offenses into one judgment and sentenced Defendant to an active minimum term of 73 to a maximum of 97 months of imprisonment.

On 10 December 2015, the trial court conducted a “bring-back hearing” to determine Defendant’s eligibility for enrollment in SBM. Prior to the start of the hearing, defense counsel filed a “Memorandum Opposing State’s Request for SBM,” in which he argued that SBM was an unreasonable Fourth Amendment search with respect to Defendant, citing *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015).

Defendant also introduced into evidence his STATIC-99R form, which determined he was a low risk offender, and a copy of the guidelines and regulations for SBM published by the North Carolina Division of Adult Correction. Defendant testified on his own behalf at the hearing, and the State declined to offer any evidence. After hearing arguments from counsel, the trial court rendered the following ruling:

All right. The Court having heard the arguments of counsel -- and I'll note [defense counsel], I understand your arguments. It's an admiral [sic] legal effort. However, the Court is inclined to follow the existing statute. And the Court would find that the mandatory nature of the statute doesn't violate its [sic] constitutional rights, particularly,

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those under the Fourth Amendment. And this may be something he wishes a higher court to review, but the Court will deny the request to not proceed under those grounds.

The trial court found that Defendant had a reportable conviction under the statute and that the conviction was for an aggravated offense. N.C. Gen. Stat. § 14-208.6(4) (2015). As a result, the court ordered Defendant to enroll in SBM for the remainder of his natural life. Defendant entered a timely notice of appeal.

II. Issue

Defendant argues the trial court erred by ordering him to enroll in lifetime SBM in the absence of any evidence from the State that lifetime SBM was a reasonable search under the Fourth Amendment.

III. Standard of Review

In *Grady*, the Supreme Court of the United States held that North Carolina's SBM program "effects a Fourth Amendment search." *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at 462. However, the Court declined to determine whether that search was reasonable.

IV. Analysis

The Court in *Grady* stated,

The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. The North Carolina courts did not examine whether the State's monitoring

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program is reasonable - when properly viewed as a search
- and we will not do so in the first instance.

Id. at ___, 191 L.Ed.2d at 462-63 (internal citations omitted).

After *Grady*, this Court has held that it is error for a trial court to order enrollment in SBM, without first determining whether under the totality of the circumstances, the application of SBM to the defendant would violate the defendant's rights under the Fourth Amendment. *See State v. Blue*, ___ N.C. App. ___, ___, 783 S.E.2d 524, 527 (2016). This Court also held the State bears the burden of proving enrollment in SBM is reasonable. *Id.*

In this case, the State concedes that it presented no evidence regarding the reasonableness of the search of enrolling Defendant in SBM. *Id.*

V. Conclusion

As the State concedes, the trial court erred by concluding “that the mandatory nature of the statute doesn’t violate [Defendant’s] constitutional rights, particularly, those under the Fourth Amendment.” The State presented no evidence to support this conclusion. “We reverse the trial court’s order and remand for a new hearing in which the trial court shall determine if SBM is reasonable, based on the totality of the circumstances.” *Id.*

REVERSED AND REMANDED.

Judges STROUD and INMAN concur.

Report per Rule 30(e).