IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-32

Filed: 4 September 2018

Forsyth County, No. 16 CRS 57045

STATE OF NORTH CAROLINA

v.

AARON KENARD WESTBROOK

Appeal by defendant from order entered 31 August 2017 by Judge Stanley L. Allen in Forsyth County Superior Court. Heard in the Court of Appeals 8 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

DAVIS, Judge.

Aaron Kenard Westbrook ("Defendant") appeals from the trial court's order requiring him to submit to satellite-based monitoring ("SBM") for the remainder of his natural life. On appeal, he argues that the State presented insufficient evidence to support the trial court's order. Because prior decisions from this Court mandate

the conclusion that the State failed to meet its burden of showing that the imposition of SBM was a reasonable search under the Fourth Amendment as to Defendant, we reverse.

Factual and Procedural Background

In 2013, when Defendant was approximately 21 years old, he was convicted of taking indecent liberties with a 15-year-old girl. While on probation, he was ordered to undergo sex offender treatment but failed to complete this treatment.

During his probation, Defendant sent a series of sexually explicit text messages to a 13-year-old girl over a period of eight days in 2016. On two occasions during this period, the girl — who lived in Defendant's housing complex — observed him masturbating through a window. On a third occasion, when Defendant and the girl were "on a chat site and they could see each other[,]" Defendant "masturbated while she watched."

On 3 April 2017, Defendant was indicted on three counts of taking indecent liberties with a child. On 31 August 2017, Defendant pled guilty to all three counts before the Honorable Stanley L. Allen in Forsyth County Superior Court. That same day, the trial court sentenced Defendant to a term of 21 to 35 months imprisonment.

Following sentencing, a hearing (the "SBM Hearing") was held to determine whether SBM was appropriate. During this hearing, the State requested that Defendant be enrolled in SBM pursuant to N.C. Gen. Stat. § 14-208.40A(c) on the

ground that he was a recidivist. In support of this request, the State presented testimony from Defendant's probation officer, David Dohig. No other witness testified. The State also provided evidence that based on his STATIC-99 assessment Defendant posed an "average" risk to reoffend. In response, Defendant's counsel argued that the imposition of lifetime SBM would violate the Fourth Amendment.

That same day, the trial court ordered that Defendant enroll in SBM for the remainder of his natural life. Defendant filed a timely notice of appeal.

Analysis

On appeal, Defendant argues that the trial court erred by imposing SBM because the State failed to meet its burden of showing that continuous GPS tracking for the remainder of Defendant's life was a reasonable search under the Fourth Amendment. We agree.

The United States Supreme Court held in *Grady v. North Carolina*, __ U.S. __, 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015) (hereinafter "*Grady I*"), that North Carolina's SBM program constitutes a search for purposes of the Fourth Amendment. *Id.* at __, 135 S. Ct. at 1371, 191 L. Ed. 2d at 462. As a result, "North Carolina courts must first examine whether the State's monitoring program is reasonable—when properly viewed as a search—before subjecting a defendant to its enrollment." *State v. Greene*, __ N.C. App. __, __, 806 S.E.2d 343, 344 (2017) (citation and quotation marks omitted). "This reasonableness inquiry requires the court to analyze 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." *Id.* at __, 806 S.E.2d at 344 (citation and quotation marks omitted).

Shortly after the Supreme Court's decision in *Grady I*, this Court issued two decisions in which we concluded that the State had failed to present evidence sufficient to establish the reasonableness of subjecting the defendant to SBM. *See State v. Blue*, 246 N.C. App. 259, 264-65, 783 S.E.2d 524, 527 (2016); *State v. Morris*, 246 N.C. App. 349, 352, 783 S.E.2d 528, 530 (2016). In both *Blue* and *Morris*, however, we noted that the trial court and the State had not had the benefit of *Grady* at the time of the defendant's SBM hearing such that it was appropriate to remand the cases for a new rehearing on the issue of whether the imposition of SBM was reasonable based on the totality of circumstances. *Blue*, 246 N.C. App. at 265, 783 S.E.2d at 527; *Morris*, 246 N.C. App. at 352, 783 S.E.2d at 530.

In *Greene*, this Court determined that the State had failed to present sufficient evidence showing the reasonableness of SBM as to the defendant in that case under the Fourth Amendment. *Greene*, __ N.C. App. at __, 806 S.E.2d at 344. The State conceded its error and stated in its appellate brief that its evidence was "too scant to satisfy its burden under the requirements of *Grady*." *Id.* at __, 806 S.E.2d at 345. We concluded that because *Blue* and *Morris* had been decided prior to the defendant's SBM hearing yet the State had still failed to present sufficient evidence to meet its

burden, the proper recourse was reversal of the trial court's SBM order without remanding for the purpose of giving the State another opportunity to establish reasonableness under the Fourth Amendment. *Id.* at __, 806 S.E.2d at 345.

In the present case, insufficient evidence was offered by the State to satisfy the Fourth Amendment inquiry. Indeed, the following exchange constituted the only reference at the SBM hearing to the requisite Fourth Amendment analysis:

> [PROSECUTOR:] And the Court, you're finding that is [sic] reasonable, it's a reasonable search, is that correct, Your Honor?
>
> [THE COURT:] I am.
>
> [PROSECUTOR:] Is that you're [sic] finding that it is a reasonable search? Because that's all that Grady requires is for the Court to find that it's a reasonable search.
>
> [THE COURT:] Yes.

In its appellate brief, the State concedes that (1) "the Court made no findings regarding the nature and purpose of the search and its impact on Defendant[;]" (2) "[t]he Court did not weigh the governmental interest in monitoring Defendant against the intrusiveness of the search and Defendant's expectations of privacy[;]" and (3) "the trial court did not identify the evidence presented by the State which supported its reasonableness conclusion." We agree.

The trial court failed to make any findings demonstrating that it properly analyzed the evidence presented at the SBM hearing to determine whether the SBM

requested was a reasonable search for purposes of the Fourth Amendment. Thus, it is clear that the trial court's order is insufficient. The only remaining question is whether remand is appropriate in order for the trial court to make additional findings. Based on *Greene*, such a remand would be proper only if we are satisfied that the State met its burden at the SBM hearing of presenting sufficient evidence that could support a finding of reasonableness.

At the SBM hearing, the State offered testimony from Dohig as to how the GPS ankle monitor would operate and the manner in which the monitor would track Defendant's movements. The State also provided evidence that Defendant had previously been convicted of one sex offense crime and posed an "average risk" for recidivism based on his STATIC-99 assessment.

In *State v. Grady*, __ N.C. App. __, __ S.E.2d __ (filed May 15, 2018) (No. COA17-12) (hereinafter "*Grady II*"), this Court recently reviewed for the first time the validity of an SBM order that expressly sought to comply with the United States Supreme Court's mandate. With regard to the question of whether the State's evidence was sufficient to establish reasonableness under a "general Fourth Amendment approach based on diminished expectations of privacy," we stated that *Grady I* required the trial court to look at "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." *Id.* at __, __ S.E.2d __, slip op. at 5 (citing

Grady I, __ U.S. at __, 135 S. Ct. at 1371, 191 L. Ed. 2d at 463) (quotation marks omitted).

We determined that testimony from a probation officer at the defendant's SBM hearing tended to show the nature and purpose of the search because it described the manner in which the defendant's ankle monitor would impact his everyday life and track his movements. However, we concluded that because the State's evidence failed to show that (1) SBM was an effective remedy to protect the public from sex offenders; and (2) the defendant posed a "current threat of reoffending" such that SBM was necessary, the State had not demonstrated that it possessed a legitimate interest in monitoring the defendant's whereabouts through GPS tracking for the remainder of his life. *Id.* at __, __ S.E.2d __, slip op. at 16. Thus, we determined that the trial court had erred by finding the imposition of SBM to be reasonable under the Fourth Amendment. *Id.* at __, __ S.E.2d at __, slip op. at 20-21.

This Court recently applied *Grady II* in *State v. Griffin*, __ N.C. App. __, __ S.E.2d __ (August 7, 2018) (No. COA17-386). In that case, the defendant pled guilty in 2004 to a first-degree sex offense with a child who lived in his household and was released from prison eleven years later. In 2015, the trial court held a "bring-back" hearing to determine if the defendant was eligible for SBM. During this hearing, the State offered evidence that the defendant had presented a "moderate-low" risk of recidivism on his STATIC-99 assessment. *Id.* at __, __ S.E.2d at __, slip op. at 3. In

addition, the defendant's probation officer testified that although the defendant had not completed the required sex offender treatment he had not committed any new criminal offenses or violated the terms of his probation since being released from prison. The probation officer described the "physical dimensions of the SBM tracking device, how it is worn, and its general function." *Id.* at__, __ S.E.2d at __, slip op. at 3. The trial court determined that the State's evidence coupled with the fact that the defendant had held a "position of trust" with the victim was sufficient to warrant the imposition of SBM for a period of thirty years. *Id.* at __, __ S.E.2d at __, slip op. at 4.

On appeal, we reversed the trial court's ruling on Fourth Amendment grounds. We stated that "[d]ecisions from other jurisdictions . . . holding that SBM is generally regarded as effective in protecting the public from sex offenders are not persuasive in light of this Court's binding decision in *Grady II* that the State must present some evidence to carry its burden of proving that SBM actually serves that governmental interest." *Id.* at __, __ S.E.2d at __, slip op. at 11. As a result, we ruled, the State was required to present evidence as to "the efficacy of the SBM program" but had failed to do so. *Id.* at __, __ S.E.2d at __, slip op. at 10. In addition, we noted that the trial court had made no findings reflecting "whether [it] determined that Defendant's betrayal of trust or failure to complete or participate in [the sex offender treatment program] increased his likelihood of recidivism." *Id.* at __, __ S.E.2d at __, slip op. at 13.

In the present case, the trial court made *no* findings reflecting that it had actually considered the totality of the circumstances in determining that SBM was appropriate as required by the United States Supreme Court in *Grady I*. Moreover, the State did not introduce any evidence regarding the efficacy of SBM in protecting the public from recidivism. Nor did the State demonstrate through competent evidence that the imposition of lifetime SBM was necessary in order to prevent Defendant — based on his particular circumstances — from reoffending.

Thus, the State has failed to meet its burden of showing that SBM was reasonable under the Fourth Amendment. Moreover, the State is not entitled to a remand for the purpose of allowing it a "second bite at the apple." *See Griffin*, __ N.C. App. at __, __ S.E.2d at __, slip op. at 14 (reversing SBM order without remand where "the State failed to present any evidence that SBM is effective to protect the public from sex offenders"); *Grady II*, __ N.C. App. at __, __ S.E.2d at __, slip op. at 20 (declining to remand because "the State will have only one opportunity to prove that SBM is a reasonable search of the defendant" (citation omitted)); *Greene*, __ N.C. App. at __, 806 S.E.2d at 345 (holding that "a case for satellite-based monitoring is the State's to make" and reversing order denying Defendant's motion to dismiss application for SBM).

We are bound by our decisions in *Grady II* and *Griffin*. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals

has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Accordingly, we reverse the trial court's SBM order.[1]

Conclusion

For the reasons stated above, we reverse the trial court's 31 August 2017 order requiring Defendant to enroll in SBM.

REVERSED.

Judge INMAN concurs.

Judge DILLON dissents by separate opinion.

Report per Rule 30(e).

[1] Based on our holding, we need not address Defendant's argument that the trial court's SBM order also violated the North Carolina Constitution.

No. COA18-32 – STATE v. WESTBROOK

DILLON, Judge, dissenting.

I agree with the majority that we are compelled to vacate the order of the trial court requiring Defendant to submit to satellite-based monitoring ("SBM") based on two cases recently decided by panels of our Court, *State v. Griffin*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2018 N.C. App. LEXIS 792 (2018), decided just this month, and *State v. Grady*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2018 N.C. App. LEXIS 460 (2018) (hereinafter "*Grady II*"), decided this past May. Based on these cases, we are compelled to conclude that the State failed to meet its burden of proving the efficacy of SBM tracking to deter Defendant from reoffending, and, accordingly, failed to prove that SBM tracking of Defendant would constitute a "reasonable" search.

I believe, however, that the holdings in *Griffin* and *Grady II* have heightened the burden on the State to show the reasonableness of an SBM search from what was understood to be its burden at the time of the call-back hearing in this case. Therefore, I disagree with the majority's mandate to reverse the trial court's order. I vote to vacate the order and to remand the matter for a new *Grady* hearing. At this hearing the State would be afforded the opportunity to meet its new heightened burden, and the trial court would enter findings of fact and conclusions of law regarding the reasonableness of the search based on the evidence presented.

I. Discussion

In 2006, our General Assembly made the policy decision to establish a program requiring that certain sex offenders be subject to satellite-based monitoring. In 2010, our Supreme Court held the SBM program to be civil in nature and, therefore, could be applied to those who committed covered sex offenses prior to 2006. *State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010).

In 2015, the United States Supreme Court held that, though our SBM program may be civil, attaching "a device to [a sex offender's] body, without consent, for the purpose of tracking that individual's movements" amounts to a "search" under the Fourth Amendment. *Grady v. North Carolina*, ___ U.S. ___, ___, 135 S. Ct. 1368, 1370 (2015). Therefore, the Court held, a trial court must determine that a "search" is reasonable before ordering a sex offender to wear a monitor under our SBM program. *Id.* at ___, 135 S. Ct. at 1371 (stating that "[t]he Fourth Amendment prohibits only *unreasonable* searches").

Importantly, the United States Supreme Court directed that our trial courts determine reasonableness based on "*the totality of the circumstances*," which would include "the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* (emphasis added).

Since *Grady*, we have held that the burden lies with the State to demonstrate the reasonableness of a proposed SBM search. *See State v. Greene*, ___ N.C. App. ___, ___, 806 S.E.2d 343, 345 (2017). Accordingly, following *Grady*, the State has had the

burden in each case to show that SBM would be reasonable based on the totality of the circumstances.

Part of the "totality of the circumstances" calculus includes whether the offender poses a threat to reoffend. Also, and more important to the issue raised in *Griffin* and *Grady II*, part of the calculus includes whether an SBM search would be effective in furthering the State interest in deterring the offender from reoffending or from loitering in locations where he is not allowed to be. *See Bowditch*, 364 N.C. at 351, 700 S.E.2d at 12 (recognizing that "[t]he SBM program is concerned with protecting the public against recidivist tendencies of convicted sex offenders").

Based on *Griffin* and its interpretation of *Grady II*, the State fails to meet its burden of showing reasonableness based on the totality of the circumstances where it fails to produce any empirical data or expert testimony showing that an SBM search would be effective in reducing the likelihood that the offender would reoffend. I believe that, prior to *Griffin* and *Grady II*, it was reasonable for the State to assume that testimony explaining how an SBM search allows law enforcement to track the movements of an offender was *some* evidence to support a finding that the offender would be less likely to reoffend if he was subjected to an SBM search. I conclude that it is within the common experience that one being watched is less likely to offend than one not being watched. Expert testimony and empirical studies are not required for a trial judge, as factfinder, to make this finding. Indeed, it is common sense that

thieves are less likely to strike if they are aware that security cameras are present; and children are less likely to go where they are not supposed to go if they know that their parents are tracking their movements through the "Find My iPhone" app.

It is indeed a government interest to *prevent* recidivism among sex offenders. And SBM monitoring is not 100 percent reliable to prevent a sex offender from reoffending or traveling where he is not supposed to be. Certainly, a security camera cannot descend from its mount to prevent a robbery, and an iPhone cannot prevent a minor from going where his parents have forbidden him to go. But it is also a government interest to lessen the likelihood that an offender will reoffend. I believe that a factfinder, without the aid of empirical data or expert testimony, can find that a sex offender is *less likely* to reoffend or go where he is not supposed to go if he knows his movements are being watched. By way of example, if the trial court found that an offender is tempted when he is around children and that the offender has been ordered not to loiter near a schoolyard, the trial court, as factfinder, could find that the offender would be less likely to loiter near a schoolyard, and therefore less likely to be tempted to reoffend, if he knew that his location was being monitored.

I conclude that it would have been reasonable, prior to *Griffin* and *Grady II*, to believe that a finding that an SBM search, by its "nature,"[2] is effective in reducing the likelihood of recidivism, when coupled with other findings, could support a trial

[2] The "nature" of the search is part of the "totality of the circumstances" calculus. *Grady*, ___ U.S. at ___, 135 S. Ct. at 1371.

court's ultimate conclusion that an SBM search was reasonable based on the "totality of the circumstances," notwithstanding that the State did not offer empirical data, expert testimony, and the like to prove the efficacy of an SBM search. Indeed, our Court, in a 2009 case where no empirical data or expert testimony appeared to be offered, recognized that "SBM provisions could have a deterrent effect. Presumably, sex offenders would be less likely to repeat offenses since they would be aware their location could be tracked and it would be easier to catch them." *State v. Bare*, 197 N.C. App. 461, 476, 677 S.E.2d 518, 529 (2009). Also, our Supreme Court has suggested that an SBM search has a deterrent effect. *See Bowditch*, 364 N.C. at 363, 700 S.E.2d at 19 (n. 14). Further, our Court has held that, in the context of a traffic checkpoint, a trial court's conclusion that a Fourth Amendment seizure was reasonable is supported, in part, by a finding that a traffic checkpoint "deter[red] driver's license violations" and that this "deterrence goal was a reasonable one," where that finding was based solely on officer testimony[3] and *not* on any expert testimony that checkpoints had some deterrent effect. *State v. Jarrett*, 203 N.C. App. 675, 679-80, 692 S.E.2d 420, 425 (2010).

In any event, since the "*Grady* reasonableness hearing" in this matter, our Court decided *Griffin* and *Grady II*. In *Grady II*, our Court held that the State had failed to meet its burden of proving that an SBM search would be reasonable in that

[3] The opinion states that the officer "was the only witness to testify[.]" *State v. Jarrett*, 203 N.C. App. at 676, 692 S.E.2d at 423.

case. *Grady II*, ___ N.C. App. at ___, ___ S.E.2d at ___, 2018 LEXIS at *22. The *Grady II* Court based its conclusion on its determination that "the State failed to present any evidence of its need to monitor defendant, or the procedures actually used to conduct such monitoring in unsupervised cases." *Id.* It did not seem to base its ultimate holding on the State's failure to produce empirical studies or the like to show the efficacy of SBM tracking, but rather this failure was just one part of the "totality of the circumstances" calculus:

> At the time of defendant's remand hearing, the SBM program had been in effect for approximately ten years. However, the State *failed to present any evidence of its efficacy* in furtherance of the State's undeniably legitimate interests. The State conceded this point . . . during oral arguments before this Court.
>
> Defendant, however, presented multiple reports authored by the State and federal governments rebutting the widely held assumption that sex offenders recidivate at higher rates than other groups. . . . Here, we are compelled to conclude that the State failed to carry its burden.

Grady II, ___ N.C. App. at ___, ___ S.E.2d at ___, 2018 LEXIS at *20 (emphasis added). Regarding the first half of the above quote, I conclude that the Court is merely pointing out that the State failed to put forth any empirical data or expert testimony which showed the efficacy of an SBM search, a point that was conceded by the State. The Court was not making any specific holding. Regarding the second half of the quote, I do not see how the defendant's evidence as described was relevant in determining whether an SBM search of Mr. Grady would be reasonable; the evidence

did not suggest that Mr. Grady was not a threat to recidivate. Rather, the evidence merely suggested offenders of certain non-sex crimes would be just as likely to recidivate as Mr. Grady. Whether to focus SBM searches on sex offenders and not, for instance, bank robbers is a policy decision to be made by our General Assembly, and not the Courts. A search of Mr. Grady does not become less reasonable just because bank robbers also recidivate and should be searched as well.

In any event, three months after *Grady II*, our Court in *Griffin* held that, even though the State offered evidence that an SBM search tracked Mr. Griffin's movements, the State automatically lost because it "presented no evidence that the SBM program is effective to serve the State's interest in protecting the public against sex offenders[.]" *Griffin*, ___ N.C. App. at ___, ___ S.E.2d at ___, 2018 LEXIS at *14. That is, *Griffin* held that the attempt to show the reasonableness of an SBM search based on the "totality of the circumstances" automatically failed because the State failed to bring in an expert witness or produce a study which showed that offenders would be less likely to reoffend or go to locations where they were not allowed to go if they knew that there movements were being watched. *Id.*

In the present case, there are factors in the "totality of the circumstances" calculus which tend towards reasonableness which were not present in either *Griffin* or *Grady II*. For instance, the defendants in those cases committed their offenses prior to 2006, when the General Assembly enacted the SBM law. Here, Defendant

did not commit his offense until after the General Assembly enacted the SBM law. However, we are compelled by *Griffin* and *Grady II* to conclude that the State's proof in this case automatically fails the "totality of the circumstances" test because of its failure to offer any empirical data or the like to prove the efficacy of an SBM search to lessen the likelihood of recidivism.

But since the State could not have known about *Griffin* and *Grady II* at the time of the hearing in the present case, I believe it is only fair to remand this matter to allow the State the opportunity to present expert testimony or empirical studies to show that an offender is less likely to reoffend if he knows his movements are being tracked.