IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1172

Filed: 20 August 2019

Rowan County, No. 16CRS054879

STATE OF NORTH CAROLINA

v.

WILLIAM ALLEN HALL

Appeal by defendant from judgment entered on or about 6 April 2018 by Judge Anna M. Wagoner in Superior Court, Rowan County. Heard in the Court of Appeals 8 May 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 Aaron Thomas Johnson, for defendant-appellant.

STROUD, Judge.

Defendant appeals an order of lifetime satellite-based monitoring ("SBM"). Because the State presented no evidence of the effectiveness of SBM to prevent recidivism, the trial court should have granted the defendant's motion to dismiss the State's petition.

I. Background

In April of 2018, defendant entered into a *Alford* plea to indecent liberties with a child.[1] At the beginning of the SBM hearing, the State noted that the trial court had already held defendant's sentencing hearing "earlier this week[,]" and thus was familiar with the factual background of defendant's conviction. The State presented no evidence regarding SBM, only argument. The State's argument was very similar to its argument in *State v. Anthony*, ___ N.C. App. ___, ___ S.E.2d ___ (COA18-1118), which is filed simultaneously with this opinion. The State recited in its argument various statistics regarding recidivism of sex offenders but did not provide any of the studies to the trial court or defendant, nor are they in our record on appeal. Defendant argued the SBM petition should be dismissed because the State failed to present any evidence establishing the reasonableness of the search effected by lifetime SBM and also raised other constitutional arguments.

II. Standard of Review

"An appellate court reviews conclusions of law pertaining to a constitutional matter de novo." *Id.* at ___, ___ S.E.2d at ___ (citation and quotation marks omitted).

III. Reasonableness of SBM

Defendant argues that based upon *State v. Grady*, ___ N.C. App. ___, 817 S.E.2d 18 (2018) ("*Grady II*"), and *State v. Griffin*, ___ N.C. App. ___, 818 S.E.2d 336

[1] The State argued defendant was a recidivist who had molested both his step-sister and daughter and was already on probation.

(2018), the State was required to make a specific showing of the reasonableness of the search imposed by SBM based upon "evidence regarding the efficacy of satellite-based monitoring" because without this evidence "it is not possible to determine (1) whether SBM actually accomplishes what it is supposed to accomplish; (2) whether some less intrusive alternative might suitably advance the State's legitimate interests; or (3) whether the benefits to the State ultimately outweigh the burdens imposed on the defendant." We agree.

The State argues that the evidence presented at the sentencing hearing was sufficient to support the trial court's SBM order:

> There was no reason for the State to reinvent the proverbial wheel by introducing the same or similar evidence from Defendant's plea, a second time during the SBM proceeding. From a practical standpoint, never mind judicial economy, it would not have made sense for the exact same judge to hear the exact same or similar evidence she heard only days earlier.

But there was no evidence presented at the sentencing hearing regarding SBM. Specifically, there was no evidence addressing the efficacy of SBM; whether some less intrusive alternate may protect the State's interest; or whether the benefits of SBM outweigh the burdens on defendant. At the sentencing hearing, the trial court heard the factual basis for defendant's charges and victim impact evidence. Much of the State's brief addresses this evidence, and there is no doubt that defendant's crime was reprehensible and his actions caused tremendous harm to his victim, but those

are not the questions presented for imposition of SBM, which our courts have repeatedly held is not a punishment for a crime but a civil regulatory scheme. *See State v. Bowditch*, 364 N.C. 335, 336, 700 S.E.2d 1, 2 (2010) ("We hold that the SBM program at issue was not intended to be criminal punishment and is not punitive in purpose or effect."). For purposes of SBM, the trial court must base the order on the defendant's actual conviction, and it is not necessary for the State to present the factual evidence underlying the charges; in fact, presentation of evidence regarding other accusations against a defendant which he has not been convicted of would be inappropriate. *See State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009) ("The General Assembly's repeated use of the term 'conviction' compels us to conclude that, when making a determination pursuant to N.C.G.S. § 14–208.40A, the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction.").

As to the effectiveness of lifetime SBM in preventing defendant from committing another sex offense, the State's argument concedes -- we assume inadvertently -- that SBM as currently administered by North Carolina cannot prevent defendant from committing a crime because no one is actually watching the location data produced by SBM in real time: "as far as SBM is concerned, unless he goes into an exclusion zone, he is free to come and go as he pleases."

As the State admits,

> Thus a critical point is not simply that there is access to defendant's movement, arguably as it relates to exclusion zones, but that someone is actually watching those movements at given times. While Defendant must comply with the schedule 24 hours a day, there was no evidence that anyone would actually be watching Defendant's every movement 24 hours a day.

At best, the location data from SBM could theoretically help law enforcement officers after a crime is reported to determine who may have been at the site of the crime, although the State also did not present any evidence showing that SBM data has ever assisted in solving a crime.

The State also stresses the statistics it recited as part of its argument to the trial court regarding recidivism by sex offenders. As in *Anthony*, the State presented only argument about the statistics and studies but did not present any of the studies to defendant or the trial court. *Anthony*, ___ N.C. App. at ___, ___ S.E.2d at ___. As in *Anthony*, the State argues the trial court could take, and did take, judicial notice of these studies, although the State did not request it. *Id.* at ___, ___ S.E.2d at ___. For the same reasons discussed in *Anthony*, the trial court could not take judicial notice under Rule 201(b) of the statistics recited by the State. *Id.* at ___, ___ S.E.2d ___. And even if the studies had been provided to the trial court and defendant, and judicial notice taken, the studies did not address the efficacy of SBM, only recidivism rates of sex offenders in general.

IV. Conclusion

For the reasons above and those discussed in *Anthony*, ___ N.C. App. ___, ___ S.E.2d ___ (COA18-1118), which is filed simultaneously with this opinion, we reverse.

REVERSED.

Judges HAMPSON and YOUNG concur.

Report per Rule 30(e).