IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-469

Filed: 19 November 2019

Forsyth County, No. 14 CRS 58974

STATE OF NORTH CAROLINA

v.

JOSHUA WAYNE CLEMONS, Defendant.

Appeal by Defendant from order entered 14 July 2017 by Judge V. Bradford Long in Superior Court, Forsyth County. Heard in the Court of Appeals 28 November 2018.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for the Defendant-Appellant.

McGEE, Chief Judge.

Joshua Wayne Clemons ("Defendant") appeals from the trial court's order requiring him to submit to satellite-based monitoring ("SBM") for the remainder of his natural life. We reverse the trial court's order.

I. Factual and Procedural Background

Defendant was convicted of felony indecent liberties with a minor and required to register as a sex offender on 16 December 1999. Subsequently, on 17 September 2014, while he was still registered as a sex offender, Defendant was charged with one count of sexual battery pursuant to N.C. Gen. Stat. § 14-27.5A(A) and one count of assault on a female pursuant to N.C. Gen. Stat. § 14-33(C)(2). Defendant was convicted of both charges in District Court, Forsyth County on 29 June 2015. Defendant filed timely notice of appeal and demanded a trial *de novo* in Superior Court, Forsyth County on 1 July 2015.

Defendant pleaded guilty to both misdemeanor charges in Superior Court, Forsyth County on 3 October 2016. During the plea hearing, the State presented testimony from a "Detective Davis" as a summary of the factual basis for Defendant's plea. Detective Davis testified that on 25 May 2016, Defendant was highly intoxicated at a sports event and had "attempted to kiss" a fourteen-year-old girl "on the lips." When the girl and her friend, also a fourteen-year-old girl, tried to run away from Defendant, he followed them and grabbed the friend "by the buttocks to the point where [she] felt his fingers pressed firmly against her anus." That same night, Defendant also "placed his arm around" a twelve-year-old girl "and attempted to speak to her as well."

After entering his plea, Defendant was sentenced to a consolidated term of 150 days imprisonment. That same day, the trial court held a hearing on whether to

subject Defendant to lifetime SBM. At the 3 October 2016 hearing, the State's sole witness who testified was Probation Officer David Dohig. Officer Dohig admitted on cross-examination that he was unable to provide any statistics as to the effectiveness of SBM in preventing recidivism. The State also submitted a "Memorandum in Support of the Reasonableness of Satellite Based Monitoring," which outlined empirical evidence and cases from other courts; as well as two exhibits, including a "Static-99 Coding Form," which indicated that Defendant posed a "moderate-low" risk for reoffending; and a document titled "Monitoring High-Risk Sex Offenders With GPS Technology: An Evaluation of the California Supervision Program Final Report," a study demonstrating the effectiveness of SBM on high-risk offenders in California. Defendant filed a brief opposing the imposition of SBM and, after the hearing, submitted as an exhibit an article titled "Recidivism of Adult Sexual Offenders."

The trial court entered an order on 14 July 2017 requiring Defendant to enroll in SBM for lifetime monitoring. Defendant appeals.

II. Analysis

Defendant contends that the trial court erred in its imposition of lifetime SBM upon him. We agree.

In 2015, the Supreme Court of the United States held that North Carolina's SBM program constitutes a search for purposes of the Fourth Amendment in *Grady v. North Carolina,* ___ U.S. ___, 191 L. Ed. 2d 459 (2015) (hereinafter *"Grady I").* "The

State's [SBM] program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search." *Id.* at ___, 191 L. Ed. 2d at 462. The Supreme Court stated that the North Carolina courts had not examined whether the State's SBM program was reasonable, when "properly viewed as a search." *Id.* at ___, 191 L. Ed. 2d at 463. Upon eventual remand to the state superior court, the trial court entered an order determining that the SBM program was constitutional. This Court reversed, but only as to Mr. Grady individually. *State v. Grady*, ___ N.C. App. __, ___, 817 S.E.2d 18, 21 (2018) ("*Grady II*"), *aff'd as modified*, ___ N.C. ___, 831 S.E.2d 542 (2019).

The Supreme Court of North Carolina recently held: "We conclude that the Court of Appeals erroneously limited its holding to the constitutionality of the program as applied only to Mr. Grady, when our analysis of the reasonableness of the search applies equally to *anyone* in Mr. Grady's circumstances." *State v. Grady*, ___ N.C. ___, ___, 831 S.E.2d 542, 546 (2019) ("*Grady III*") (citation omitted) (emphasis added). Our Supreme Court specifically concluded 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.

Id. at ___, 831 S.E.2d at 553.

Our Supreme Court more specifically held that in North Carolina,

> "SBM's enrollment population consists of (1) offenders on parole or probation who are subject to State supervision, (2) unsupervised offenders who remain under SBM by court order for a designated number of months or years, and (3) unsupervised offenders subject to SBM for life, who are also known as 'lifetime trackers.'" *State v. Bowditch*, 364 N.C. 335, 338, 700 S.E.2d 1, 3 (2010)). Mr. Grady is in the third of these categories in that he is subject to SBM for life and is unsupervised by the State through probation, parole, or post-release supervision. Additionally, Mr. Grady is a "recidivist," which makes lifetime SBM mandatory as to him without any individualized determination of the reasonableness of this search. Because we conclude that the relevant portions of N.C.G.S. §§ 14-208.40A(c) and 14-208.40B(c) are unconstitutional as applied to all individuals who, like Mr. Grady, are in the third *Bowditch* category and who are subject to mandatory lifetime SBM based solely on their status as a "recidivist," we modify and affirm the opinion of the Court of Appeals.

Id. at ___, 831 S.E.2d at 546–47.

Based upon our Supreme Court's holding in *Grady III*, we conclude that the trial court in this case erred in its imposition of lifetime SBM upon Defendant.

The Supreme Court reiterated that

> the application of the relevant portions of N.C.G.S. §§ 14-208.40A(c) and 14-208.40B(c) to individuals in the same category as defendant, under which these individuals are required to submit to a mandatory, continuous, nonconsensual search by lifetime satellite-based monitoring, violates the Fourth Amendment to the United States Constitution. The category to which this holding applies includes only those individuals who are not on probation, parole, or post-release supervision; who are subject to lifetime SBM solely by virtue of being recidivists

> as defined by the statute; and who have not been classified as a sexually violent predator, convicted of an aggravated offense, or are adults convicted of statutory rape or statutory sex offense with a victim under the age of thirteen. As applied to these individuals, the intrusion of mandatory lifetime SBM on legitimate Fourth Amendment interests outweighs the "promotion of legitimate governmental interests."

Id. at ___, 831 S.E.2d at 568-69 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653, 132 L. Ed. 2d 564, 574 (1995)).

The record in the case before us shows that our Supreme Court's holding in *Grady III* applies to Defendant in that Defendant is "in the same category" as Mr. Grady. First, the record shows that Defendant has completed his sentence and Defendant is not on probation, parole, or post-release supervision. *See* N.C.G.S. §§ 15A-1368.1 (2017) (post-release supervision does not apply to misdemeanor offenders). Second, the trial court ordered Defendant to submit to lifetime SBM based solely on his status as a statutorily defined "recidivist." Third, Defendant has not been classified as a sexually violent predator, convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen. Therefore, as in *Grady III*, for Defendant "the intrusion of mandatory lifetime SBM on legitimate Fourth Amendment interests outweighs the 'promotion of legitimate governmental interests.'" *Grady*, ___ at ___, 831 S.E.2d at 569 (quoting *Vernonia*, 515 U.S. at 653, 132 L. Ed. 2d at 574). Defendant's case and *Grady III* are indistinguishable.

III. Conclusion

For the reasons stated above, we reverse the trial court's 14 July 2017 SBM order.

REVERSED.

Judges TYSON and BERGER concur.

Report per Rule 30(e).