An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-652-2

Filed: 21 July 2020

Carteret County, No. 13 CRS 54303

STATE OF NORTH CAROLINA

v.

ROBERT HUGHES SPRINGLE

Appeal by defendant from order entered 14 February 2017 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 14 November 2017. Defendant's petition for writ of certiorari to our Supreme Court, No. 329P18, allowed for the limited purpose of remanding the case to the Court of Appeals for further consideration in light of *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) (No. 179A14-3). Panel reconvened to consider the imposition of lifetime satellite-based monitoring in light of *Grady*, by Order of the Chief Judge, Court of Appeals of North Carolina, 10 September 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli and Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

BRYANT, Judge.

Following the reasoning of our Supreme Court in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019), and consistent with our jurisprudence as to other SBM cases, we are constrained to acknowledge that the order directing defendant Robert Hughes Springle to enroll in satellite-based monitoring for his natural life, based primarily on his status as a recidivist, is in violation of the Fourth Amendment. Accordingly, we reverse.

On 4 September 2014, in Carteret County Superior Court, before the Honorable Benjamin G. Alford, Judge presiding, defendant pled guilty to two counts of felonious indecent exposure. The trial court entered judgment in accordance with defendant's plea agreement and sentenced defendant to concurrent active terms of eight-to-ten months. Defendant was given credit for time served, both active terms were suspended, and defendant was placed on supervised probation for a period of sixty months.

On 10 November 2014, defendant was brought back for a probation review hearing for satellite-based monitoring (SBM). The hearing was conducted before the Honorable Jack Jenkins, Judge presiding. The court found that felonious indecent exposure was a sexually violent offense, as defined by our General Statutes, section 14-208.6(5), and that defendant was a recidivist, as defined by section 14-208.6(1a). The court ordered defendant to register as a sex offender for his natural life. The

court further ordered that defendant be enrolled in an SBM program for his natural life. Defendant appealed the 2014 order.

On appeal, this Court noted that defendant's written notice of appeal failed to comply with Rule 3 of our Rules of Appellate Procedure ("Appeal in Civil Cases—How and When Taken"), and thus, his appeal was subject to dismissal. However, this Court granted a writ of certiorari to review defendant's SBM order, acknowledging that the State conceded it suffered no prejudice as a result of defendant's defective notice.

The matter was heard on 3 November 2015, and on 5 January 2016, this Court issued *State v. Springle*, 244 N.C. App. 760, 781 S.E.2d 518 (2016) (hereinafter "*Springle I*"), in which we reversed the trial court's SBM order on the ground there was insufficient evidence to conclude defendant was a recidivist sex offender. The matter was remanded for a new SBM hearing to determine if any of defendant's prior out-of-state convictions were substantially similar to North Carolina sex offenses and thus supported the conclusion that defendant was a recidivist sex offender.

An SBM hearing was held on 13 February 2017, this time before Judge Alford. The hearing court concluded that defendant's prior out of state convictions for "lewd and lascivious exhibition" were substantially similar to North Carolina offenses; the current offenses were sexually violent offenses; and defendant was a recidivist sex offender. As to the reasonableness of an SBM search, the court considered evidence

presented by the State which included testimony from a probation officer regarding the operation of the SBM device when attached to a subject and a memorandum of law setting forth appellate court opinions discussing why SBM is reasonable as applied to recidivist sex offenders. [R. p. 40–44]. In an order entered 14 February 2017, the court made the following findings of fact:

> Recidivism posed by sex offenders is frightening and high
>
> The efficacy of the satellite based monitoring system has been accepted by the courts
>
> It is proper for the State to recognize and reasonably react to a known danger in order to protect its citizen
>
> Damage done to minor sexual assault victims is serious
>
> The U S Supreme Court has recognized protection of children to be a compelling state interest
>
> Monitoring does not prohibit the Defendant from travel, work, or otherwise enjoying the ability to legally move about as he wishes. The monitoring devise [sic] simply records where he has traveled to ensure that he is compiling [sic] with the terms of his probation and State law
>
> Satellite based monitoring is a de minims [sic] infringement on the Defendant's constitutional rights
>
> The public interest in the benefit of monitoring the Defendant outweighs any minimal impact on the Defendant's reduced privacy interest
>
> Based on a totality of the circumstances, imposing satellite based monitoring on the Defendant is reasonable

Based on its findings of fact, the court concluded that "[b]ased on a totality of the circumstances, imposing [SBM] on defendant is reasonable." Defendant was again ordered to register as a sex offender for life and to enroll in the SBM program for life. Defendant again appealed to this Court.

On 14 November 2017, defendant's second appeal was heard before this Court. On 7 August 2018, this Court issued an opinion dismissing defendant's appeal for again failing to comply with Rule 3 of our Rules of Appellate Procedure. *State v. Springle*, No. COA17-652, 2018 WL 3734361 (N.C. Ct. App. Aug. 7, 2018) (unpublished) (hereinafter "*Spring II*"). Defendant petitioned our Supreme Court for discretionary review.

In an order entered 6 September 2019, our Supreme Court allowed defendant's petition for discretionary review (No. 329P18) of *Springle II* for the limited purpose of remanding the matter to this Court for further consideration in light of our Supreme Court's opinion in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019). By order entered 10 September 2019, the Chief Judge of the Court of Appeals reconvened the panel to review this matter in light of *Grady*.

In *Grady*, our Supreme Court held that

> the State's SBM program is unconstitutional in its application to all individuals in the same category as [the] 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.

372 N.C. at 522, 831 S.E.2d at 553.

Defendant—who was placed on probation for a term of sixty-months (five years) beginning in 2014—has had the opportunity to complete his probation term. However, even if defendant were on probation and did not meet the specific requirements of *Grady*, we are unable to determine what, if any, circumstances would meet the constitutional standards emphasized in *Grady*. We have reviewed numerous North Carolina cases, both pre- and post- *Grady* and found none which upheld an SBM order after evaluating the reasonableness of an SBM search based on the totality of the circumstances. In other words, SBM orders have been consistently reversed no matter the evidence before the trial court. *See e.g.*, *State v. Bursell*, 372 N.C. 196, 827 S.E.2d 302 (2019) (affirming order to vacate and remand a trial court's SBM order where the trial court failed to determine the reasonableness of SBM); *State v. Tucker*, No. COA18-1295-2, 2020 WL 3250589 (N.C. Ct. App. Jun. 16, 2020) (unpublished) (reversing an SBM order where the State failed to establish the reasonableness of SBM under the Fourth Amendment); *State v. Clemons*, No. COA18-469, 2019 WL 6134546 (N.C. App. Ct. Nov. 19, 2019) (unpublished) (reversing lifetime SBM order, pursuant to *Grady*, where SBM was ordered solely on defendant's status as a recidivist); *State v. Stroessenreuther*, 250 N.C. App. 772, 793 S.E.2d 734 (2016)

(vacating and remanding an SBM order in order for the trial court to conduct a reasonableness analysis); *State v. Morris*, 246 N.C. App. 349, 783 S.E.2d 528 (2016) (reversing and remanding an SBM order where the trial court failed to make findings of fact and conclusions of law regarding the reasonableness of the search); and *State v. Collins*, 245 N.C. App. 478, 783 S.E.2d 9 (2016) (vacating and remanding SBM order for hearing on reasonableness of the search). *See also*, *State v Griffin*, 260 N.C. App. 629, 818 S.E.2d 336 (2018), where this Court reversed a case procedurally similar to the instant case.

In the instant case, the trial court made findings of fact regarding reasonableness of monitoring defendant by SBM, as set out herein. However, because we see no factual distinction between most of the reversed cases and the instant case, there can be no legal justification for placing defendant in a different category. *See also In the Matter of Appeal from 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." (citations omitted)) (hereinafter "*In re Civil Penalty*").

While the Supreme Court, in *Grady*, did not find the entire statutory scheme unconstitutional, its strong *dicta* addressing the constitutionality of the statutory scheme on its face in effect left no viable constitutional path for anyone, including

recidivist sex offenders not under supervision, to be subject to SBM under our General Statutes, sections 14-208.40 to -208.45. "[North Carolina SBM] statutes provide for no individualized assessment of the offender; the court has no discretion over whether to impose SBM or for how long; and no court has the authority to terminate SBM for these individuals." *Grady,* 372 N.C. at 513, 831 S.E.2d at 547–48 (citation omitted). Moreover, on the record in *Grady*, the Court found that the State failed to establish "the effectiveness of SBM in the 'promotion of legitimate governmental interests.' " *Id.* at 542, 831 S.E.2d at 567.

In directing defendant to enroll in SBM for his natural life, in pertinent part, the trial court predicated its directive primarily on the finding that defendant was a recidivist, as defined by G.S. § 14-208.6(2b). [R. p. 124]. Then, the trial court made findings and concluded that the search as applied to defendant, was reasonable and ordered SBM for life. However, for the reasons stated herein, based on *Grady* and *In re Civil Penalty*, we are constrained to reverse. Thus, the trial court's 14 February 2017 order directing defendant to enroll in SBM for his natural life must be

REVERSED.

Judge DIETZ concurs.

Judge DILLON concurs in the result only.

Report per Rule 30(e).