IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-318

Filed: 31 December 2020

Montgomery County, No. 03 CRS 050575

STATE OF NORTH CAROLINA

v.

RONNIE NELSON CLARK, Defendant.

Appeal by defendant from orders entered 7 March 2018 and 27 June 2018 by Judge Vance Bradford Long in Montgomery County Superior Court. Heard in the Court of Appeals 31 October 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 Andrew DeSimone, for defendant-appellant.

YOUNG, Judge.

Where the State failed to offer any evidence of the efficacy of the SBM program in serving the State's legitimate governmental interests, the trial court erred in imposing SBM. We reverse.

I. Factual and Procedural Background

On 27 May 2003, the Montgomery County Grand Jury indicted Ronnie Nelson Clark (defendant) for first-degree rape of a child under the age of thirteen years. Defendant pleaded no contest, and the trial court entered judgment thereupon. The court found no aggravating factors, and found as a mitigating factor that defendant accepted responsibility for his actions. The court therefore sentenced defendant to a minimum of 173 months and a maximum of 217 months in the custody of the North Carolina Department of Correction. The court further required defendant to register as a sex offender.

On 7 September 2017, defendant was notified of the need to appear for a Satellite-Based Monitoring (SBM) determination hearing. As a result of the hearing, on 7 March 2018 the trial court entered judicial findings and order, requiring defendant to enroll in SBM for twenty years. The court entered more complete findings in writing on 27 June 2018.

From the judicial findings and order, defendant appeals.

II. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied,* 363 N.C. 857, 694 S.E.2d 766 (2010).

III. Reasonable Search

In his first argument, defendant contends that the State failed to show that the imposition of SBM constituted a reasonable search. We agree.

The United States Supreme Court has held that North Carolina's SBM program effects a Fourth Amendment search. *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L. Ed. 2d 459, 462 (2015). However, "[t]he Fourth Amendment prohibits only *unreasonable* searches. 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." *Id*. This Court has held that the State bears "the burden of proving that the SBM program is reasonable." *State v. Blue*, 246 N.C. App. 259, 265, 783 S.E.2d 524, 527 (2016). On appeal, defendant contends that the State failed to meet this burden. Specifically, defendant contends that (1) the State presented no evidence of the SBM program's effectiveness at reducing recidivism, and (2) the State failed to present evidence that defendant was likely to reoffend. As a result, defendant contends that the State failed to show that the imposition of SBM was reasonable, and therefore that the trial court erred in ordering defendant to enroll in SBM.

Before the trial court below, the State presented two pieces of evidence. The first was the testimony of Officer Matthew Shoffner (Officer Shoffner). Officer Shoffner testified with regard to defendant's circumstances, his residence and employment status, his support structure, and his purported enrollment in sex

offender treatment. Officer Shoffner also testified, at a subsequent hearing, with regard to defendant's then-current electronic house arrest. He also testified as to some of what SBM would entail. The second piece of evidence offered by the State was defendant's Revised Static-99 assessment form. Based on defendant's age at release, his prior convictions, his prior sentencing dates, and an unrelated victim, the form established defendant at a Risk Level IVa, indicating above average risk of reoffending.

Based on the Static-99 form and Officer Shoffner's testimony, the trial court entered its findings and conclusions. The trial court found that defendant was currently on house arrest, which Officer Shoffner testified was similar to SBM, and that this did not interfere with defendant's ability to maintain employment; that the monitoring device would not gather any evidence on defendant other than his location; that the monitoring device would be concealed under defendant's clothing and therefore not subject him to public scrutiny; that defendant was neither a recidivist nor a sexually violent predator; that defendant's Static-99 assessment showed an above average risk of reoffending; that the State has "a legitimate governmental interest in excluding persons convicted of first degree rape of a child from exclusions zones," such as schools and daycare centers; and that the societal need to protect "the most vulnerable of our citizens from persons who have established themselves at [sic] being at risk for illegal sexual conduct is reasonable

and warranted and does not violate the defendant's constitutional rights." Based on these findings, the court concluded that the State had a legitimate interest in protecting its citizens and excluding defendant from exclusion zones, that SBM as a statutory scheme was reasonable, that defendant's expectation of privacy was not violated and his right to privacy was outweighed by the need to protect the citizens of North Carolina, and that the imposition of SBM was not cruel or unusual punishment.

Our Courts have consistently held that it is necessary, not only to show that SBM is reasonable with respect to a given defendant, but also to show that SBM is an effective means of the State serving its legitimate interest in protecting its citizens. *See State v. Grady*, 372 N.C. 509, 543-44, 831 S.E.2d 542, 568 (2019) (holding that "[t]he State has the burden of coming forward with some evidence that its SBM program assists in apprehending sex offenders, deters or prevents new sex offenses, or otherwise protects the public"); *see also State v. Griffin*, ___ N.C. App. ___, ___, 840 S.E.2d 267, 275 (holding that the State bears the burden of proving reasonableness, and its failure to produce evidence weighs against a conclusion thereof), *stay allowed*, 374 N.C. 265, 838 S.E.2d 460 (2020). In *Griffin*, for example, this Court noted that the State "did not introduce any record evidence before the trial court showing SBM is effective in accomplishing any of the State's legitimate interests." *Griffin* at ___, 840 S.E.2d at 275.

In the instant case, the State did not present any evidence, nor did the trial court enter any findings, that tended to show that the SBM program generally deterred recidivism among sex offenders or otherwise served the State's interest in protecting its citizens. The State did not offer empirical or statistical reports, or even anecdotal evidence, of the program's efficacy, instead relying solely on the nature of defendant's offense and the nature of the intrusion of SBM upon his liberties.

Our precedent is clear. Our Supreme Court has held in no uncertain terms that the State must not only show that the imposition of SBM is reasonable with respect to a particular defendant; rather, "the existence of the problem *and the efficacy of the solution* need to be demonstrated by the government." *Grady*, 372 N.C. at 541, 831 S.E.2d at 566 (emphasis added). The State offered no evidence of the efficacy of the SBM program in protecting the State's legitimate governmental interests, and therefore the trial court erred in imposing SBM upon defendant. As this Court has previously held where the State failed to meet this burden, the appropriate disposition is to reverse the trial court's order rather than to vacate and remand the matter for re-hearing. Accordingly, we reverse the trial court's order imposing SBM.

IV. Other Arguments

Defendant raises additional arguments on appeal. However, as we have held that the trial court erred in imposing SBM, we need not address these arguments.

REVERSED.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).