IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-420

No. COA20-693

Filed 3 August 2021

Durham County, No. 15CRS59450

STATE OF NORTH CAROLINA

v.

D'MONTE LAMONT O'KELLY

Appeal by Defendant from order entered 15 June 2017 by Judge Rebecca Holt in Durham County Superior Court. Heard in the Court of Appeals 8 June 2021.

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

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

COLLINS, Judge.

¶ 1 Defendant D'Monte Lamont O'Kelly appeals from the trial court's order requiring him to submit to satellite-based monitoring ("SBM") for life following his eventual release from prison. Because the State failed to establish that Defendant's submission to lifetime SBM constitutes a reasonable Fourth Amendment search, we reverse the trial court's order.

I. Background

¶ 2 On 30 May 2017, Defendant entered a plea of guilty to first-degree rape, assault with a deadly weapon inflicting serious bodily injury, first-degree sexual offense, and attempted first-degree sexual offense, with a date of offense of 25 May 2014. The convictions were consolidated into one judgment and Defendant was sentenced to an active sentence of 192 to 291 months in prison and given credit for 581 days spent in confinement prior to sentencing. [1] The trial court ordered lifetime sex-offender registration.

¶ 3 The State filed a Petition for Satellite-Based Monitoring based on Defendant's conviction for first-degree rape, an aggravated offense. Defendant filed a Motion to Dismiss the State's petition, arguing that lifetime SBM was unconstitutional, both facially and as applied. [2]

¶ 4 On 12 June 2017, the trial court held a hearing on the State's Petition for Satellite-Based Monitoring and Defendant's Motion to Dismiss. The State presented evidence from two witnesses, Investigator Adam Bongarten of the Durham Police Department and Kwanda Edwards of Probation and Parole. Bongarten testified about the investigation of Defendant for his underlying offenses and how Defendant

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[1] The trial court also imposed 60 months of SBM as a condition of his post-release supervision, *see* N.C. Gen. Stat. § 15A-1368.4(b1)(7) (2017), which Defendant is not challenging on appeal.

[2] The record does not contain a copy of the State's Petition for Satellite-Based Monitoring, but the State's petition is acknowledged in Defendant's Motion to Dismiss and the trial court's 14 June 2017 order.

was ultimately apprehended. During the course of Bongarten's investigation into a rape that occurred on 25 May 2014, DNA swabs were taken from the victim and the victim described her assailant to a composite sketch artist. On or about 13 June 2015, Defendant was arrested in connection with an unrelated robbery and a string of breaking and entering occurrences. Bongarten became involved in that investigation when another investigating officer believed Defendant matched the composite sketch created during Bongarten' s investigation of the rape. Bongarten obtained a search warrant to compare Defendant's DNA to the DNA collected from the rape investigation. Comparison testing of Defendant's DNA ultimately led to Defendant's arrest for the rape.

¶ 5 Kwanda Edwards testified about how she supervised sex offenders on probation and post-release supervision who are subject to SBM. The device used to monitor individuals consists of an ankle monitor that requires charging. Individuals she monitors are excluded from certain zones, such as daycares and schools, and the ankle monitor tracks compliance with these restrictions. If an individual who is monitored enters an excluded zone, the supervising officer gets an immediate notification. She was also required to "go in on a daily basis and actually see where they're going[.]" Once an individual is no longer on probation or post-release supervision, their supervision is transferred to an office in Raleigh but their whereabouts are still tracked daily for the remainder of their life.

¶ 6 Edwards also testified about a STATIC-99R form that was completed for Defendant, which is designed to "predict[] sexual recidivism." Defendant scored in a "moderate/high-risk range." On cross-examination, Edwards acknowledged that a STATIC-99R form should not be completed if the offender was less than 18 years old at the time he committed the offense, and that Defendant was only 16 years old when he committed the underlying offense.

¶ 7 After hearing from the State's two witnesses and arguments from counsel, the trial court explicitly stated that it did not consider Defendant's STATIC-99R in its decision, and made the following findings of fact:

> 1. The Defendant pleaded guilty to First Degree Rape, Assault with a Deadly Weapon Inflicting Serious Injury, First Degree Sex Offense, and Attempted First Degree Sex Offense on May 30, 2017.
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> . . . .
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> 11. Unlike electronic house arrest, satellite-based monitoring does not confine an individual to a particular location, but only restricts his access to certain excluded areas, such as schools and daycares.
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> 12. An individual on satellite-based monitoring is otherwise free to travel, work, and move about.
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> 13. The equipment used for satellite-based monitoring is unobtrusive and worn about the ankle.
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> 14. This intrusion of the individual's privacy is balanced against the legitimate government interest to protect the public from individuals who commit offenses with high rates of recidivism. The immediate response provided by

> satellite-based monitoring facilitates the collection of information which may assist in the detection and prosecution or exoneration of individuals who commit or are suspected of committing new offenses. This immediate response may also have a deterrent effect on those individuals who are subject to satellite-based monitoring.

¶ 8 Additionally, although mislabeled in its order as findings of fact, the trial court made the following conclusions of law:[3]

> 8. The offense of First Degree Rape is an aggravated offense under [N.C. Gen. Stat. §] 14-208.6(1a) for which satellite-based monitoring for a defendant's natural life is authorized.
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> 9. The United States Supreme Court in Grady v. North Carolina, 135 S.Ct. 1368 (2015), has specifically held that North Carolina's satellite-based monitoring program is a search.
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> 10. The Fourth Amendment of the United States Constitution prohibits unreasonable searches. A determination of the reasonableness of a search depends on evaluating the totality of the circumstances, balancing the extent to which the search promotes legitimate government interests versus the extent of the invasion of an individual's privacy interests.
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> 15. The legitimate government interest outweighs the intrusion into the Defendant's privacy. Under the totality of the circumstances, satellite-based monitoring constitutes a reasonable search of the Defendant.

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[3] "[F]indings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal." *State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008). When distinguishing between findings of fact and conclusions of law, "any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *Id.*

> 16. Satellite-based monitoring is not unconstitutional on its face or as applied to this Defendant.
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> 17. This Court is satisfied by a preponderance of the evidence that lifetime satellite-based monitoring of the Defendant is authorized and appropriate.

The trial court ordered Defendant to enroll in SBM for the remainder of his natural life following his release from prison, unless monitoring was terminated pursuant to N.C. Gen. Stat. § 14-208.43.[4] Defendant filed timely notice of appeal.

II. Analysis

¶ 9 On appeal Defendant contends that the trial court erred by ordering lifetime SBM because (1) the State failed to demonstrate that the lifetime search was reasonable under the Fourth Amendment; (2) SBM is facially unconstitutional as applied to offenders in Defendant's class; and (3) SBM constitutes a general warrant in violation of Article I, § 20 of the North Carolina Constitution.

¶ 10 "An appellate court reviews conclusions of law pertaining to a constitutional matter de novo." *State v. Bowditch,* 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citation omitted).

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[4] Once an offender has completed his active sentence and any period of probation, parole, or post-release supervision, he may "file a request for termination of monitoring requirement with the Post-Release Supervision and Parole Commission." N.C. Gen. Stat. § 14-208.43(a) (2017). The Commission has the discretion to terminate the monitoring requirement if offender has substantially complied with monitoring and "the Commission finds that the person is not likely to pose a threat to the safety of others." *Id.* § 14-208.43(c) (2017).

¶ 11 North Carolina's SBM program is a civil regulatory scheme that requires lifetime enrollment in SBM for certain offenders if the trial court finds that

> (i) the offender has been classified as a sexually violent predator pursuant to [N.C. Gen. Stat. §] 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, or (iv) the conviction offense was a violation of [N.C. Gen. Stat. §] 14-27.23 or [N.C. Gen. Stat. §] 14-27.28[.]

N.C. Gen. Stat. § 14-208.40B(c) (2017).

¶ 12 In 2015, the Supreme Court of the United States held that enrollment of an individual in our SBM program constitutes a search for purposes of the Fourth Amendment and requires an inquiry into the reasonableness of the search under the totality of the circumstances. *Grady v. North Carolina,* 575 U.S. 306, 310 (2015) ("*Grady I*").

¶ 13 On remand, this Court concluded that the State failed to prove that SBM constituted a reasonable search under the Fourth Amendment because "the State failed to present any evidence of its need to monitor [the] defendant, or the procedures actually used to conduct such monitoring[.]" *State v. Grady,* 259 N.C. App. 664, 676, 817 S.E.2d 18, 28 (2018) ("*Grady II*"). The State appealed the decision to our Supreme Court, which held that imposition of mandatory lifetime SBM "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[.]" *State v. Grady,* 372 N.C. 509, 522, 831 S.E.2d 542, 553 (2019) *("Grady III")*. The North Carolina Supreme Court limited its holding to those individuals subjected to lifetime SBM due to their status as recidivists, but it reached its holding after engaging in a reasonableness analysis under the totality of the circumstances, as required by the United States Supreme Court in *Grady I*.

¶ 14 In this case, Defendant was not classified as a recidivist, so the order requiring him to submit to lifetime SBM is not facially unconstitutional under *Grady III*. However, *Grady III* "provides us with guidance as to the facts and factors to be included in the totality of the circumstances we consider." *State v. Hutchens,* 272 N.C. App. 156, 161, 846 S.E.2d 306, 311 (2020). Accordingly, we consider the totality of the circumstances to determine "whether the warrantless, suspicionless search here is reasonable when 'its intrusion on the individual's Fourth Amendment interests' is balanced 'against its promotion of legitimate governmental interests.'" *Grady III,* 372 N.C. at 527, 831 S.E.2d at 557 (citations omitted). The State bears the burden of showing the reasonableness of the search under this test. *Id.* at 543, 831 S.E.2d at 568.

1. Intrusion on Defendant's Recognizable Privacy Interest

¶ 15 "In addressing the search's intrusion on the individual's Fourth Amendment interests, the first factor to be considered is the nature of the privacy interest upon

which the search here at issue intrudes, or in other words, the scope of the legitimate expectation of privacy at issue." *Id.* at 527, 831 S.E.2d at 557 (quotation marks and citation omitted).

¶ 16 In *Grady III,* the Supreme Court addressed the privacy interests of individuals required to register as sex offenders in relation to SBM. The Court first considered the intrusiveness of the ankle monitor itself, holding that its physical restrictions, coupled with its ability to constantly track defendant's location, constituted "a deep, if not unique, intrusion[.]" *Id.* at 538, 831 S.E.2d at 564. The Court further noted that "[e]ven if . . . defendant's expectations of privacy, in comparison to those of the public at large, are greatly diminished, even drastically reduced, by virtue of the various conditions imposed by the sex offender registry, including the ongoing collection of otherwise private information made available to law enforcement and the public at large, defendant's expectations of privacy are not completely eliminated." *Id.* at 530, 831 S.E.2d at 558-59. The Court continued that "[e]ven if defendant has no reasonable expectation of privacy concerning where he lives because he is required to register as a sex offender, he does not thereby forfeit his expectation of privacy in all other aspects of his daily life." *Id.* at 531, 831 S.E.2d at 559.

¶ 17 Here, while Defendant will have diminished privacy interests arising from his offense for five years of post-release supervision, he will have no such diminished interest for the remaining years of his natural life during which he must now submit

to SBM. Moreover, while Defendant will have diminished privacy interests as a result of the various conditions imposed by the sex offender registry, he "will enjoy appreciable, recognizable privacy interests that weigh against the imposition of SBM for the remainder of Defendant's lifetime." *State v. Perez,* 854 S.E.2d 15, 21 (N.C. Ct. App. 2020) (quotation marks and citation omitted). While Defendant has an opportunity to seek relief from the SBM order by petitioning the Post-Release Supervision and Parole Commission, N.C. Gen. Stat. § 14-208.43(c), such a procedure does not amount to "judicial review of the continued need for SBM [and] is contrary to the general understanding that judicial oversight of searches and seizures, in the form of a warrant requirement, is an important check on police power." *Grady III,* 372 N.C. at 535, 831 S.E.2d at 562.

¶ 18 "Having considered the scope of the legitimate expectation of privacy at issue here, we turn next to the character of the intrusion that is complained of, which contemplates the degree of and manner in which the search intrudes upon legitimate expectations of privacy." *Id.* at 534, 831 S.E.2d at 561 (quotation marks and citation omitted).

¶ 19 In *Grady III,* the Court made several observations concerning the inherently intrusive nature of SBM, and those same observations are relevant here. The physical intrusiveness of the ankle monitoring device itself and "the extent to which GPS locational tracking provides an intimate window into an individual's privacies

of life," constitutes "a deep, if not unique, intrusion" upon an individual's protected Fourth Amendment interests. *Id.* at 538, 831 S.E.2d at 564 (quotation marks omitted). The nature of this intrusion, which includes tracking all of Defendant's movements for the remainder of his natural life, weighs against a finding of reasonableness.

¶ 20 Furthermore, we are unable to determine the extent to which the search will intrude on Defendant's privacy interests because he will not be subject to monitoring until he serves his prison term of approximately fourteen to seventeen years and five years of SBM as a condition of his post-release supervision. This Court addressed a similar situation in *Hutchens,* 272 N.C. App. 156, 846 S.E.2d 306.[5] In *Hutchens,* defendant was ordered to submit to lifetime SBM after he completed a prison term of approximately seven-and-a-half to fourteen-and-a-half years, so "the State's ability to demonstrate reasonableness [was] hampered by a lack of knowledge concerning the unknown future circumstances relevant to that analysis." *Id.* at 162, 846 S.E.2d at 312 (quotation marks and citation omitted). Here, as in *Hutchens,* the State presented "no indication that the monitoring device currently in use will be the same

[5] In *Hutchens,* this Court relied on the reasoning in *State v. Gordon,* 270 N.C. App. 468, 840 S.E.2d 907 (2020), *disc. review allowed and supersedeas allowed,* 853 S.E.2d 148 (2021). It noted that *Gordon* was not binding because the Supreme Court had issued a temporary stay at that point, but found the reasoning persuasive. *Hutchens,* 272 N.C. App. at 161, 846 S.E.2d at 311. No stay has been issued in *Hutchens* and it remains binding precedent on this Court.

as—or even similar to—the device that will be employed" upon Defendant's release from prison. *Id.* (citation omitted). Accordingly, the unknown nature of the search Defendant will be subjected to further weighs against a finding of reasonableness.

2. State's Legitimate Governmental Interests

¶ 21 When evaluating the extent to which SBM promotes a legitimate governmental interest, "the extent of a problem justifying the need for a warrantless search cannot simply be assumed; instead, the existence of the problem and the efficacy of the solution need to be demonstrated by the government." *Grady III,* 372 N.C. at 540-41, 831 S.E.2d at 566.

¶ 22 During the SBM hearing, the State presented testimonial evidence from Bongarten regarding the nature of Defendant's crimes and from Edwards regarding the nature of SBM, but the State failed to elicit any testimony from either witness as to the efficacy of SBM or present evidence of how it actually advances a legitimate governmental interest. The State argued to the trial court that SBM would "make it much harder for [Defendant] to commit new offenses and would make it easier for officers to monitor and prevent [Defendant] from committing new offenses," because "there's some kind [of] deterrent effect to it, the fact that knowing that you're being monitored[.]"

¶ 23 Although the interests argued by the State are certainly legitimate, the State failed to present any evidence demonstrating that SBM advances these legitimate

interests. The arguments made by the State during the hearing were simply legal arguments, and "it is axiomatic that the arguments of counsel are not evidence." *State v. Collins,* 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) (citations omitted).

¶ 24 "The 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[,]" and the absence of this evidence "weighs heavily against a conclusion of reasonableness here." *Grady III,* 372 N.C. at 543-44, 831 S.E.2d at 567-68. Accordingly, the lack of evidence presented by the State weighs against a finding of reasonableness.

3. Reasonableness Under the Totality of the Circumstances

¶ 25 After considering the totality of the circumstances, the imposition of lifetime SBM substantially infringes upon Defendant's appreciable privacy interests and the State failed to meet its burden of demonstrating the reasonableness of this search. Accordingly, the trial court erred by concluding, under the totality of the circumstances, that lifetime SBM constituted a reasonable and constitutional search of Defendant.

III. Conclusion

¶ 26 The imposition of lifetime SBM on Defendant constitutes an unreasonable warrantless search under the Fourth Amendment and we reverse the trial court's 14 June 2017 order. As we are reversing the order requiring Defendant to submit to

lifetime SBM, we decline to address Defendant's remaining arguments.

REVERSED.

Chief Judge STROUD and Judge WOOD concur.

Report per Rule 30(e).