IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-552

No. COA20-768

Filed 5 October 2021

Forsyth County, No. 19 CRS 61945-46

STATE OF NORTH CAROLINA

v.

KEVIN RAY HOLLIDAY

Appeal by defendant from judgment and order entered 5 March 2020 by Judge Athena Fox Brooks in Forsyth County Superior Court. Heard in the Court of Appeals 21 September 2021.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for defendant-appellant.

TYSON, Judge.

¶ 1 Kevin Ray Holliday ("Defendant") appeals from judgment entered upon his guilty plea to three counts of taking indecent liberties with a child and imposition of satellite-based monitoring ("SBM"). We dismiss Defendant's appeal.

I. Background

¶ 2 The Forsyth County Sheriff's Office received a report involving the molestation of 16-year-old minor, M.M. by Defendant on 26 September 2018. *See* N.C. R. App. P. 42(b)(3) (pseudonym used to protect the identity of a juvenile victim of sexual crimes).

¶ 3 While M.M. was living with foster parents, he was observed allowing the family dog to lick his genitals. M.M. discussed the incident during a therapy session and told the therapist he had been assaulted by a previous foster family member's brother, Defendant. M.M. was 12 and 13 years-old during the time of these allegations. Defendant was approximately 45 years old.

¶ 4 Defendant admitted engaging in non-penetrative sex with M.M. and receiving the same from M.M. M.M. said these sexual acts occurred when Defendant was supervising him and while the foster parents were out of the home. These acts occurred once in Defendant's bedroom, and once while M.M. was playing video games, and occurred during a one-year time frame from 12 December 2015 through 12 December 2016.

II. Procedural History

¶ 5 On 5 March 2020, the State presented the matter to the trial court as an off-docket matter, explaining Defendant had pending charges for three counts of indecent liberties, and he was before the court to of plead guilty to all three counts. The following colloquy occurred:

THE COURT: Have the charges been explained to you by

your lawyer? Do you understand the nature of the charges? Do you understand the elements of the charges?

DEFENDANT: Yes, ma'am.

THE COURT: Have you and your lawyer discussed any possible defenses to the charges, talked about what's in your best interest to do in this case?

DEFENDANT: Yes, ma'am.

THE COURT: Are you satisfied with your lawyer's legal services?

DEFENDANT: Yes, ma'am.

THE COURT: Do you understand you have the right to plead not guilty and be tried by a jury. At such trial you have the right to confront and cross-examine witnesses against you. That by your please (sic), you give up these and other rights related to a jury trial?

DEFENDANT: Yes, ma'am.

. . . .

THE COURT: Do you understand that following a plea of guilty, there are limits on your right to appeal?

DEFENDANT: Yes, ma'am.

. . . .

THE COURT: Do you understand you're pleading guilty to three counts of indecent liberties, each of which have a maximum possible punishment of 59 months?

DEFENDANT: Yes, ma'am.

THE COURT: Do you now personally plead guilty?

DEFENDANT: Yes, ma'am.

> THE COURT: And are you in fact guilty of these?
>
> DEFENDANT: Yes, ma'am.

¶ 6 At sentencing, the court sentenced Defendant to a term of 19 to 32 months in the presumptive range, with an active sentence of 120 days with jail credit for 111 days, and the remainder of the sentence suspended for 60 months with probation. The State presented the STATIC-99 form. The trial judge found and ruled:

> THE COURT: Under this findings (sic) for sex offenders, indecent liberties qualifies as a sexually violent offense under 14-208.6, sub paragraph five. The defendant has not been classified as a violent predator. Reading the statute and the definition, he would qualify as a recidivist, which brings us to, he needs to register for his natural life. It brings us to the satellite based-monitoring, unless it's terminated. The static 99 is an above average risk.

¶ 7 Defendant's sentencing worksheet indicated three prior convictions for third degree sexual exploitation of a minor. As noted above, Defendant's STATIC-99 was above average risk. The trial court continued:

> [the] offenses were all within the same year, therefore, based on the risk assessment of the Department of Adult Corrections and Juvenile Justice requires the highest level of supervision monitoring, shall enroll in satellite-based monitoring for a period of 48 months for reevaluation. And the Department of Adult Corrections will perform a risk assessment of the defendant, report the results to the court. The defendant is ordered to reappear before this Court at its session on or at the end of the 48 months of probation supervision.

¶ 8 The court determined the present charges and Defendant's prior convictions

occurred around the same time and the prosecutions were delayed. The court determined this caused the court "some pause about actually ordering the whole natural life satellite-based monitoring." The court determined another hearing should be scheduled to see if SBM would continue be necessary.

¶ 9 The probation officer indicated Defendant's counseling was an "on-going program . . . . It could last two years, it could last four years. . . . he'll probably be in it at least a few more years." The court made written findings that Defendant's crimes were sexually violent; Defendant was a recidivist; and his crimes involved the mental, physical, or sexual abuse of a minor.

¶ 10 Defendant's attorney responded, "I'm not sure that he would wish to appeal that." The court responded, "It's not gonna hurt to have some clarity on satellite-based monitoring." His attorney then responded, "perhaps we'll just note an objection now. . . . Just so if we need clarity on the issue further down the line."

¶ 11 On 7 March 2020, Defendant filed written notice of appeal.

III. Issues

¶ 12 Defendant raises four issues on appeal: (1) the trial court erred by imposing SBM when the State failed to present any evidence demonstrating the search met constitutional reasonableness standards; (2) the trial court erred by imposing SBM because SBM is facially unconstitutional for offenders in Defendant's class; (3) the trial court erred by ordering lifetime SBM because the SBM program constitutes a

general warrant in violation of Article I, § 20 of the North Carolina Constitution; and, (4) the provision of the SBM order requiring Defendant to appear for a second SBM hearing is void, on the ground the trial court lacks jurisdiction to conduct another SBM hearing.

IV. Jurisdiction

¶ 13 Defendant indicates he appeals pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2019). A defendant who enters a guilty plea, without preserved rulings, has no statutory right to appeal from the trial court's judgment. *See* N.C. Gen. Stat. § 15A-1444(e) (2019).

¶ 14 Defendant purports to raise three constitutional challenges on appeal. Defendant argues for the first time on appeal that his SBM violates either the Constitutions of the United States or of North Carolina. He also cites *State v. Singleton*, 201 N.C. App. 620, 626, 689 S.E.2d 562, 566 (2010), as authority for his right to appeal. Neither the statute nor the precedent cited grants this Court jurisdiction to consider the constitutionality of his SBM order.

A. State v. Singleton

¶ 15 Defendant relies upon *State v. Singleton* where the ultimate holding addressed the right of the trial court to consider the factual basis of the crime in question when determining whether the crime was "aggravated" for purposes of imposing SBM. *See State v. Singleton*, 201 N.C. App. at 626-30, 689 S.E.2d at 566-569.

¶ 16 The trial court did not impose SBM on the basis of an aggravated offense and *Singleton* does not stand for the position that the underlying facts of a crime could not be considered for other grounds in ordering SBM. *Singleton* did not address the constitutionality of an SBM order and was pre-*Grady*. *See id.*

B. Rule 2

¶ 17 Defendant, recognizing the three issues he raises on appeal are otherwise barred, asks this Court to invoke to Rule 2 to review the claim and avoid a "manifest injustice" or "to expedite a decision in the public interest." N.C. R. App. P. 2. This Court may review an unpreserved constitutional issue pursuant to Rule 2 on the grounds asserted. The decision to invoke Rule 2 rests within to the Court's discretion. *State v. Bursell*, 372 N.C. 196, 201, 827 S.E.2d 302, 306 (2019).

¶ 18 The discretionary decision to invoke Rule 2 to reach an unpreserved SBM issue is made on a case-by-case basis. *Id.* at 200, 827 S.E. at 305-06.

> [W]e must be cautious in our use of Rule 2 not only because it is an extraordinary remedy intended solely to prevent manifest injustice, but also because 'inconsistent application' of Rule 2 itself leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not.

State v. Bishop, 255 N.C. App.767, 770, 805 S.E.2d 367, 370 (2017) (citation omitted).

¶ 19 Defendant argues he is entitled to a Rule 2 review and cites *State v. Bursell*. In *Bursell*, the defendant pled guilty to statutory rape and indecent liberties with a

minor. Upon sentencing, defense counsel specifically objected to lifetime SBM and cited the Fourth Amendment. *Bursell,* 372 N.C. at 197, 827 S.E.2d at 303-04. The State conceded that if the defendant had properly preserved his constitutional issues, the SBM order should be vacated. *Id*. at 198, 827 S.E. at 304.

¶ 20 Here, Defendant argues the trial court's language indicates it understood counsel's "note an objection now" in context and this assertion raised and preserved the constitutionality of SBM. We do not presume to know or infer what the trial court and counsel thought and reasoned throughout the colloquy, other than what is stated in the transcript.

¶ 21 This Court is without jurisdiction to review Defendant's constitutional arguments. Defendant made no objection to the constitutionality of applying SBM to him at his sentencing and SBM hearing. Having failed to raise a constitutional objection at the hearing, Defendant has failed to preserve the constitutional arguments he now purports to raise on appeal. *See State v. DeJesus*, 265 N.C. App. 279, 291, 827 S.E.2d 744, 753 (2019) (holding where a post-*Grady II* defendant "made no argument before the trial court at his sentencing hearing that the satellite-based monitoring constituted an unreasonable Fourth Amendment search . . . . [He] essentially asks this Court to take [an] extraordinary step[] to reach the merits . . . by invoking Rule 2 of the North Carolina Rules of Appellate Procedure to address his unpreserved constitutional argument."). Defendant has also failed to petition for

certiorari under Rule 21. *See* N.C. R. App. P. 21.

C. Facial Challenge

¶ 22 Defendant argues the SBM program is facially invalid and is unconstitutional for his class of offenders. In *State v. Grady*, 372 N.C. 509, 547, 831 S.E.2d 542, 570 (2019) ("*Grady III*") our Supreme Court issued a decision vacating SBM for a limited class of offenders. Defendant is a recidivist. In addition to recidivism, he committed a reportable offense on several bases, including an offense involving sexual abuse of a minor, and a sexually violent offense. Defendant is not currently unsupervised, and he will receive the benefit of a review hearing before the trial court to determine the necessity of continued supervision. Defendant is not in the very limited class of offenders for whom the holding in *Grady III* applies. His constitutional argument on the basis of the holding of *Grady III* is without merit. State v. Hilton __ N.C. __, __, 2021-NCSC-115, ¶ 36 , __ S.E.2d __, __ (2021) ("[T]he State's interest in protecting the public—especially children—from aggravated offenders is paramount . . . . an aggravated offender has a diminished expectation of privacy . . . lifetime SBM causes only a limited intrusion into that diminished privacy expectation . . . . [T]he paramount government interest outweighs the additional intrusion upon an aggravated offender's diminished privacy interests. [W]e hold that a search effected by the imposition of lifetime SBM on the category of aggravated offenders is reasonable under the Fourth Amendment. [T]he SBM statute as applied to

aggravated offenders is not unconstitutional.").

¶ 23 Defendant's argument challenging facial invalidity also fails as this Court presumes SBM, as a statutory regime, is constitutional, resolving "all doubts in favor of [its] constitutionality." *State v. Whiteley*, 172 N.C. App. 772, 778, 616 S.E.2d 576, 580 (2005). The burden in mounting a facial challenge to the constitutionality of SBM is heavy, and is "the most difficult challenge." *Grady III*, 372 N.C. at 564, 831 S.E.2d at 581 (citation omitted).

V. Reasonableness

¶ 24 "[T]he State shall bear the burden of proving that the [satellite-based monitoring] program is reasonable." *State v. Greene*, 255 N.C. App. 780, 783, 806 S.E.2d 343, 345 (2017) (citations omitted). "[T]he lack of any individualized assessment of the offender or his offense characteristics and of any meaningful opportunity for termination of SBM[.]" is subject to challenge. *Grady III,* 372 N.C. at 547, 831 S.E.2d at 570.

¶ 25 In the colloquy above, the trial court reasonably considered Defendant's record, the State's lag in bringing the charges, Defendant's good behavior, heard from witnesses, received and reviewed the STATIC-99, and anticipated Defendant's SBM requirement could be reduced in four to five years. The trial court also considered Defendant's current observation by his probation officer, and Defendant's potential exposure to minors. The court noted Defendant would be subjected to SBM for 48

months and would reappear to evaluate his probation supervision. The court stated:

> So that gives you time to complete you (sic) treatment and assessment. Gives probation time to work with you. Gives you time to prove yourself, sir. And also is within that five years of probation, so that you're still going to be on supervision during that period as well. Now, I can notate your objection to that, if you want.

¶ 26 Defendant filed a written notice of appeal challenging the issuance of his SBM order. On appeal, he argues the trial court was without authority to mandate a subsequent hearing to review of the necessity of his continued supervision. Defendant was granted a meaningful opportunity for release from SBM.

¶ 27 Defendant argues on one hand, ordering SBM for a term of years while under probation supervision limited Defendant's right to a review, while also arguing the trial court had no statutory authority to order SBM for a term of years. He asserts the trial court cannot be both. *See State v. Thompson*, 273 N. C. App. 686, 698, 852 S.E.2d 365, 374 (2020) ("[U]nlike the thirty-year SBM order we considered in *Griffin*, ten years is not 'significantly burdensome and lengthy.'").

¶ 28 The SBM statutes allow review by the Parole Commission for lifetime SBM, and the statutes are silent on the right of a defendant to seek review from the Parole Commission for a term of years. Nothing in the SBM statutes prohibits a trial court from ordering its own review of a matter that is properly before it. N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2019).

¶ 29 The subsequent hearing does not prejudice Defendant. On the contrary, it accomplishes a just result by ensuring should justice require removal of SBM, there is a clear and predetermined path to do so. Defendant's argument is without merit.

VI. Conclusion

¶ 30 Defendant waived his right to appeal his constitutional arguments for his first three issues on appeal. Defendant's hearing was reasonable, his future SBM review hearing is not prejudicial, and is within the scope and discretion of the trial court. In the exercise of our discretion, we decline to invoke Rule 2 of the Rules of Appellate Procedure. We dismiss the appeal. *It is so ordered.*

DISMISSED.

Judge GORE and JACKSON concur.

Report per Rule 30(e).