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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-634

Filed: 21 February 2017

Alamance County, No. 14 CRS 54385

STATE OF NORTH CAROLINA

v.

JONATHAN CHAD MODLIN, Defendant.

Appeal by defendant from order entered 5 January 2016 by Judge Reuben F. Young in Alamance County Superior Court. Heard in the Court of Appeals 11 January 2017.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.*

*William D. Spence for defendant.*

ZACHARY, Judge.

Jonathan Chad Modlin (defendant) appeals from an order requiring him to enroll in lifetime satellite-based monitoring (SBM). Defendant argues that the trial court erred by failing to conduct a hearing regarding the reasonableness of SBM enrollment, as required by *Grady v. North Carolina*, \_\_ U.S. \_\_, 191 L. Ed. 2d 459 (2015) (per curiam), before making its SBM determination. For the reasons that

follow, we vacate the trial court's order and remand for a new hearing on the reasonableness of requiring defendant to enroll in lifetime SBM.

### **I. Background**

In February 2015, the Alamance County Grand Jury indicted defendant on six counts of statutory rape, one count of second-degree sexual offense, and one count of crime against nature. Pursuant to a plea agreement with the State, defendant pleaded guilty to the aforementioned offenses in January 2016. The plea agreement also provided that defendant would receive a mitigated minimum sentence of 144 months' and a maximum sentence of 233 months' imprisonment. In exchange, the State agreed to dismiss ten additional counts each of statutory rape and second-degree sexual offense.

On 5 January 2016, Judge Reuben F. Young held a hearing on sentencing and the issue of SBM. After conducting a colloquy on defendant's guilty plea and hearing evidence from the State related to the charges, Judge Young sentenced defendant in accordance with the plea agreement's terms.

Following sentencing, the trial court proceeded to determine whether defendant should be subject to SBM upon his release from prison. Before hearing from the parties, Judge Young announced his findings that defendant had been convicted of a reportable offense (statutory rape) that was sexually violent and "aggravated." See N.C. Gen. Stat. § 14-208.40A(a) ("When an offender is convicted of

a reportable conviction as defined by G.S. 14-208.6(4), during the sentencing phase, the district attorney shall present to the court any evidence that . . . (iii) the conviction offense was an aggravated offense. . . .”). Defendant’s argument in response was that factual circumstances unique to his case distinguished it from prior precedent holding that statutory rape is an aggravated offense for the purposes of SBM enrollment. *See State v. Sprouse*, 217 N.C. App. 230, 241, 719 S.E.2d 234, 242 (2011) (“[G]iven our recent holding in *Clark* that ‘an act of sexual intercourse with a person deemed incapable of consenting as a matter of law is a violent act,’ we must affirm the trial court’s orders of lifetime SBM based on [the] defendant’s convictions of statutory rape.”) (quoting *State v. Clark*, 211 N.C. App. 60, 75, 714 S.E.2d 754, 764 (2011)). The State contended that *Sprouse* controlled. Judge Young agreed, and he ordered that defendant enroll in lifetime SBM. Defendant then gave oral notice of appeal. When asked if either party wished to further discuss the matter, defense counsel replied, “Nothing further from the defendant, Your Honor.” Defendant appeals from the SBM order.

## **II. SBM Order**

### **A. Appellate Jurisdiction**

As an initial matter, while defendant noticed his appeal in open court, he failed to give written notice of his appeal from the trial court’s SBM order. Oral notice of appeal pursuant to N.C. R. App. P. 4(a)(1) “ ‘is insufficient to confer jurisdiction on

this Court’ in a case arising from a trial court order requiring a litigant to enroll in SBM.” *State v. Cowan*, 207 N.C. App. 192, 195, 700 S.E.2d 239, 241 (2010) (quoting *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010)). Rather, because SBM hearings are civil in nature, a defendant challenging his enrollment in the program must give written “notice of appeal pursuant to N.C. R. App. P. 3(a) as is proper in a civil action or special proceeding.” *Id.* at 195, 693 S.E.2d at 206 (citation, quotation marks, and brackets omitted). Accordingly, defendant’s oral notice failed to confer appellate jurisdiction upon this Court and his appeal must be dismissed.

Recognizing the mistake, defendant filed a petition for a writ of certiorari as the basis for our review of this case. “The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]” N.C. R. App. P. 21(a)(1) (2015). In our discretion, we allow defendant’s petition and consider his challenge to the imposition of SBM.

#### B. Lifetime SBM

On appeal, defendant contends that the trial court erred by ordering him to enroll in lifetime SBM without conducting the proper reasonableness inquiry enunciated by the United States Supreme Court in *Grady v. North Carolina*, \_\_ U.S.

\_\_\_, 191 L. Ed. 2d 459 (2015) (per curiam). Defendant failed to make this argument before the trial court, and he raises it for the first time on appeal.

The United States Supreme Court held in *Grady* that North Carolina's SBM program implicates the Fourth Amendment's privacy protections. *Id.* at \_\_\_, 191 L. Ed. 2d at 462 ("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."). The *Grady* Court went on to hold that this

conclusion, however, does not decide the ultimate question of the program's constitutionality. The 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. The North Carolina courts did not examine whether the State's monitoring program is reasonable—when properly viewed as a search—and we will not do so in the first instance.

*Id.* at \_\_\_, 191 L. Ed. 2d at 462-63 (emphasis added and internal citations omitted).

In applying *Grady*, this Court has recently held that a defendant is entitled to a "reasonableness" hearing before the State can impose SBM. *State v. Blue*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 783 S.E.2d 524, 527 (2016); *State v. Morris*, \_\_\_, N.C. App. \_\_\_, \_\_\_, 783 S.E.2d 528, 529 (2016). In a "reasonableness" hearing, the trial court must "analyze 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.'" *Blue*, \_\_\_ N.C. App. at \_\_\_, 783 S.E.2d at 527 (quoting *Grady*, 575 U.S. at \_\_\_, 191 L. Ed. 2d at

462). The State bears the burden of proving that imposing SBM enrollment on a particular defendant is reasonable. *Id.*

Because defendant failed to make any argument related to *Grady* at the trial level, we must determine whether to address the merits of his appeal. Ordinarily, a defendant who does not raise a constitutional theory or argument in the trial court fails to preserve the issue for appellate review. *State v. Golphin*, 352 N.C. 364, 403-04, 533 S.E.2d 168, 197 (2000). We believe the circumstances of this case, however, justify the invocation of Rule 2 of the Rules of Appellate Procedure. Neither party had the benefit of this Court's analysis in *Blue* and *Morris* when defendant's SBM hearing was conducted, and the trial court never acknowledged that its SBM determination effected a Fourth amendment search. Therefore, pursuant to Rule 2, we suspend the rules concerning the preservation of appellate issues and consider defendant's argument regarding the reasonableness of the trial court's SBM determination.

In *Morris*, this Court recognized that a trial court is required to do more than just reference *Grady* and "summarily conclude[]" that imposing a period of SBM constitutes a reasonable search. \_\_ N.C. App. at \_\_, 783 S.E.2d at 529 (holding that the trial court erred by simply recognizing *Grady* and concluding that SBM was reasonable without inquiring into the totality of circumstances). The trial court in the present case made no reference to *Grady*; nor did the court contemplate whether

requiring defendant to enroll in lifetime SBM was reasonable by considering the totality of circumstances. As the State concedes in its brief, “[t]o the extent that this Court reaches the merits of defendant’s appeal, . . . the trial court erred by failing to conduct a *Grady* reasonableness hearing.” Given the trial court’s failure to address whether the imposition of SBM on defendant violates the Fourth Amendment, we vacate the SBM order and remand for a new hearing.

### **III. Conclusion**

On remand, *Grady* requires that the trial court conduct a new hearing that includes a clear determination of whether, under the totality of circumstances, the application of SBM to defendant constitutes a reasonable search pursuant to the dictates of the Fourth Amendment.

VACATED AND REMANDED.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).