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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-517

Filed: 7 November 2017

Hyde County, No. 15 CRS 50006

STATE OF NORTH CAROLINA

v.

MICHAEL FARROW, Defendant.

Appeal by Defendant from order entered 12 January 2017 by Judge Wayland J. Sermons, Jr. in Hyde County Superior Court. Heard in the Court of Appeals 4 October 2017.

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

*Office of the Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Michael Farrow (“Defendant”) appeals from the trial court’s order requiring him to enroll in the State’s satellite-based monitoring program for a period of ten years following his release from prison. On appeal, Defendant contends the trial court erred in ordering satellite-based monitoring in the absence of sufficient

evidence from the State demonstrating this was a reasonable search under the Fourth Amendment. We agree and, thus, we reverse the trial court's order.

### **I. Factual and Procedural Background**

This is Defendant's second appeal to this Court. Defendant was convicted by a jury of one count of taking indecent liberties with a child and found a habitual felon. The trial court sentenced Defendant to 132 to 171 months in prison, and imposed lifetime satellite-based monitoring. Defendant petitioned this Court for writ of certiorari to review his convictions for plain error alleging, among other things, he was entitled to a separate hearing to assess whether the imposition of lifetime satellite-based monitoring is reasonable, pursuant to *Grady v. North Carolina*, \_\_\_ U.S. \_\_\_, 191 L. Ed. 2d 459 (2015). *State v. Farrow*, No. COA16-450, 2016 WL 6695847, at \*1 (unpublished) (N.C. Ct. App. Nov. 15, 2016). In our opinion we noted, in *Grady* the United States Supreme Court held our State's satellite-based monitoring program "effects a Fourth Amendment Search" therefore, the "ultimate question of the program's constitutionality' depended on the reasonableness of the search." 2016 WL 6695847, at \*4 (quoting *Grady*, \_\_\_ U.S. at \_\_\_, 191 L. Ed. at 462). Thus, we remanded the case to the trial court for a new hearing to determine whether Defendant's enrollment in the satellite-based monitoring program is reasonable. 2016 WL 6695847, at \*4.

STATE V. FARROW

*Opinion of the Court*

On remand the trial court conducted a hearing to determine whether Defendant should be ordered to enroll in the program. The State called Joseph Smith, the sergeant with the Hyde County Sheriff's Office who investigated Defendant's underlying offense of taking indecent liberties. Smith described the incident, explaining Defendant molested a thirteen year old female while visiting the young girl's mother at her residence. The girl screamed in protest, and Defendant offered her money to keep quiet. Smith testified the sheriff's office "has had numerous dealings with [Defendant] in the past." Smith described Defendant's living situation and employment status, explaining Defendant lived in a camper behind his brother's house and was self-employed in the scrap-metal business. The State introduced Defendant's prior record level worksheet, which indicated he had a prior record level of six.

On cross-examination by defense counsel, Smith testified he had heard of satellite-based monitoring, and he was "somewhat" familiar with it. He indicated he understood the device would monitor Defendant's every move, even in his home. The State then indicated it had no further evidence, but the Court requested to see a Static-99 form.<sup>1</sup> The State then called Margaret W. Poston, an employee with the Department of Public Safety. Poston performed the Static-99 assessment on Defendant and concluded he scored a zero which is a "low risk" category.

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<sup>1</sup> A Static-99 coding form is an actuarial assessment used to determine a sex offender's risk for recidivism.

STATE V. FARROW

*Opinion of the Court*

Defendant moved to dismiss the State's satellite-based monitoring application arguing the State "failed to make a prima facie case showing that . . . [it is] reasonable for satellite-based monitoring to be placed with [Defendant]." The court denied Defendant's motion. Defendant did not present any evidence, and renewed his motion to dismiss. Again, the court denied the motion.

The court heard argument from both sides concerning whether Defendant requires satellite-based monitoring. The State argued Defendant should be considered a recidivist as he was convicted of indecent liberties with a child in 1994. Defense counsel contended the State's monitoring program is unconstitutional on its face as it "imposes a continuous warrantless search that is unsupported by probable cause, and therefore, it cannot be a reasonable search under the Fourth Amendment." Defense counsel further argued because Defendant scored zero points on the Static-99 Form, he does not qualify for satellite-based monitoring. Furthermore, when Defendant is released from prison he plans to rehabilitate himself and already has employment plans and housing arrangements.

The court determined Defendant's conviction involved the physical, mental, or sexual abuse of a minor, thus he was eligible for enrollment in the monitoring program. In considering whether Defendant requires the highest possible level of supervision and monitoring the court made the following findings:

1. That the defendant had a prior conviction that was not qualifying as a recidivist but is an identical offense to

STATE V. FARROW

*Opinion of the Court*

which the defendant is now convicted of.

2. That the defendant has a long and extensive criminal history involving drugs, alcohol[,] and traffic offenses and has 24 prior record level points.

3. That the Static 99 is, in the [c]ourt's view, a low label for risk category; however, it is on the very high end of low. Low is minus 3 through 1, this Static 99 is 0 (zero).

Based on these findings, the court made the following conclusion of law:

The [c]ourt has . . . read the opinion of the court of appeals in this case. The [c]ourt has read the opinion in *Grady [v.] North Carolina* and has weighed the reasonableness of the intrusion upon the defendant by having an ankle bracelet against the need for the State to determine where the defendant is at all times . . . and with the reasonable privacy expectations of this defendant and in doing so, the [c]ourt is going to determine that a period of time is appropriate for the defendant to be monitored upon his release from prison.

The court allowed each party to offer suggestions regarding a suggested period of time. The State recommended a period of ten years, and Defendant offered no suggestion. The court then ordered Defendant to enroll in the program for a period of ten years. Defendant gave oral notice of appeal in open court.

**II. Jurisdiction**

Defendant's appeal from the superior court's final order lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

**III. Standard of Review**

Review of a trial court's determination regarding whether imposition of satellite-based monitoring is reasonable under the Fourth Amendment, is a question of law which is reviewed *de novo*. *State v. Martin*, 223 N.C. App. 507, 508, 735 S.E.2d 238, 238 (2012).

#### **IV. Analysis**

On appeal, Defendant contends the trial court erred in determining it was reasonable to subject Defendant to satellite-based monitoring because the State failed to meet its burden of proving Defendant's enrollment is reasonable under the Fourth Amendment. We agree.

In *Grady*, the Supreme Court of the United States held North Carolina's satellite-based monitoring program constitutes a Fourth Amendment search and therefore must be reasonable based on the totality of the circumstances. \_\_\_ U.S. at \_\_\_, 191 L. Ed. 2d at 462. The court stated "[t]he 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.* Subsequently in *State v. Blue*, this Court reversed and remanded the trial court's order when "the trial court simply acknowledged that [satellite-based monitoring] constitutes a search and summarily concluded it is reasonable." \_\_\_ N.C. App. \_\_\_, \_\_\_, 783 S.E.2d 524, 527 (2016) ("We reverse the trial court's order and remand for a new hearing in which the trial court shall determine if [satellite-based monitoring] is

STATE V. FARROW

*Opinion of the Court*

reasonable, based on the totality of the circumstances, as mandated by the Supreme Court of the United States in *Grady v. North Carolina.*”); *see also State v. Morris*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 783 S.E.2d 528, 529-30 (2016) (reversing and remanding the trial court’s order for a new hearing to determine whether satellite-based monitoring is reasonable). In *Blue* we also held “the State shall bear the burden of proving that the [satellite-based monitoring] program is reasonable.” *Blue* at \_\_\_, 783 S.E.2d at 527.

In Defendant’s first appeal, we remanded the case for the trial court to conduct a hearing to determine the reasonableness of lifetime satellite-based monitoring as required by the Fourth Amendment. Yet, on remand the State presented no evidence other than the nature of the incident, Defendant’s criminal record, and Defendant’s Static-99 assessment indicating he is in a “low risk” category for recidivism. The State presented no evidence regarding the nature of the satellite-based monitoring program and its impact on Defendant. Nor did the State make any argument regarding the reasonableness of such a search under the Fourth Amendment.

Consequently, the trial court made no findings regarding the nature and purpose of the search and its impact on Defendant. The court did not weigh the governmental interest in monitoring Defendant against the intrusiveness of the search and Defendant’s expectations of privacy. The court summarily stated it “weighed the reasonableness of the intrusion upon the defendant by having an ankle bracelet against the need for the State to determine where the defendant is at all

times . . . and with the reasonable privacy expectations of this defendant” without making any finding regarding these competing interests. The State concedes the trial court did not “identify the evidence presented by the State [which] supported [its] ‘reasonableness’ conclusion[.]” Thus, we conclude the trial court erred in ordering satellite-based monitoring because the State’s evidence was insufficient to demonstrate enrollment constitutes a reasonable Fourth Amendment search.

In our recent decision *State v. Greene* we discussed the appropriate remedy when the State fails to present sufficient evidence to establish enrollment in the satellite-based monitoring program constitutes a reasonable Fourth Amendment search. \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (October 3, 2017) (No. COA17-311). We stated, “[a]fter *Grady* was decided, there was some uncertainty concerning the scope of the State’s burden at satellite-based monitoring proceedings[.]” *Id.* However, we noted now “the State’s burden [is] no longer uncertain. . . . *Blue* and *Morris* made clear that a case for satellite-based monitoring is the State’s to make.” *Id.* Therefore, we reversed the trial court’s order, rather than remand the case for more hearings. *Id.* Here, as in *Greene*, we determine the appropriate remedy is to reverse the trial court’s order.

In its brief, the State contends the trial court erred in its determination Defendant is not a recidivist eligible for lifetime [satellite-based monitoring]

enrollment. However, the State did not appeal from the trial court's order, and thus, is precluded from challenging the order on appeal.

The State also argues the trial court's initial order imposing lifetime monitoring on Defendant is undisturbed and thus, on remand the trial court erred in imposing monitoring for a ten-year period. We are not persuaded by the State's contentions. We are also bound by another panel's decision under *In re Appeal from Civil Penalty* and realize the trial court did not have the benefit of this decision when it made its determination. *In re 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.").

## **V. Conclusion**

For the foregoing reasons, we reverse the trial court's order requiring Defendant to enroll in satellite-based monitoring.

REVERSE.

Judges STROUD and TYSON concur.

Report per Rule 30(e).