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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-931

Filed: 20 March 2018

Robeson County, No. 05 CRS 57743

STATE OF NORTH CAROLINA

v.

KIDDIE CARLOS HAMMONDS

Appeal by Defendant from order entered 8 March 2017 by Judge James G. Bell in Robeson County Superior Court. Heard in the Court of Appeals 12 March 2018.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Defendant-Appellant.

INMAN, Judge.

Kiddie Carlos Hammonds ("Defendant") appeals from the trial court's order imposing satellite-based monitoring. Defendant argues that the trial court failed to properly address the reasonableness of satellite-based monitoring as required by the Fourth Amendment. After careful review, we reverse the trial court's order.

Facts and Procedural History

On 4 October 2006, Defendant entered a plea of guilty to second degree rape and taking indecent liberties with a child. The trial court sentenced him to consecutive active imprisonment terms of fifty-eight to seventy-nine months and sixteen to twenty months.

After Defendant was released from prison, he received notice of a hearing to determine whether he was required to enroll in satellite-based monitoring ("SBM") pursuant to N.C. Gen. Stat. § 14-208.40B (2015). A "bring-back" hearing began on 29 June 2016 in Robeson County Superior Court, during which the parties addressed the issue of whether second degree rape qualified as an aggravated offense. At the outset of the hearing, the prosecutor indicated that a probation officer was on his way to the hearing, but that the State did not yet need the probation officer's testimony. The prosecutor explained that the trial court's ruling as to whether the offense was aggravated would dictate whether the probation officer's testimony was necessary. At the conclusion of the hearing, Judge Bell took the matter under advisement and continued the hearing.

The hearing resumed eight months later on 8 March 2017 before a different superior court judge. At the outset of the hearing, the prosecutor[1] explained that the hearing had two parts: the first to determine whether the offense subjected Defendant

[1] The transcript identifies the prosecutor as an unidentified male voice. However, the transcript also lists an appearance by Assistant District Attorney Alex Hooks, and from the context of the transcript, it is apparent that the unidentified male voice is that of the assistant district attorney.

to lifetime monitoring; and the second to determine whether SBM enrollment constituted a reasonable search in light of *Grady v. North Carolina*, 572 U.S. ___, 191 L. Ed. 2d 459 (2015) (per curiam). The trial court concluded that the offense for which Defendant was convicted was an aggravated offense and involved the physical, mental, or sexual abuse of a minor.

The trial court then addressed the issue of Fourth Amendment reasonableness. The State directed the court to make particular findings pursuant to *Grady*. The prosecutor stated as follows:

> [T]he presentation by [the probation officer] when he testified was as to number one would have been as to the visibility of the device when the [D]efendant was wearing it. As he testified, the device would have been able to be covered by pants. It would not be visible unless the pants actually come up. That it was water resistant if I remember right up to a certain depth, but it did prevent the Defendant from water activities or from bathing. It had to be charged I think two hours every 48 hours, it had to be charged for a period of two hours. The Defendant would just need access to a simple outlet in order to charge it, that it did not—it would not provide any information beyond the location of the Defendant. It would not provide video or audio type of surveillance or any particular information, any information about the Defendant or what necessarily he was doing, just simply show the location.

Despite the prosecutor's statement, the probation officer did not testify at either hearing date; nor did the State call other witnesses.

After the prosecutor's statement, the trial court stated that it "would make those findings and find that the satellite-based monitoring would be reasonable, and

it would be for a period to include his natural life." On the same day, the trial court entered an order requiring Defendant to enroll in lifetime SBM. Defendant appeals.

Analysis

In Defendant's sole argument on appeal, he contends that the trial court erred in ordering lifetime SBM in the absence of any evidence from the State that lifetime monitoring was a reasonable Fourth Amendment search under *Grady*.

1. Preservation of the Issue

As a preliminary matter, the State argues that Defendant waived appellate review of this issue by failing to object to SBM enrollment on the ground that it constituted an unreasonable search. We are not persuaded.

It is well-established that "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Rawlings*, 236 N.C. App. 437, 443, 762 S.E.2d 909, 914 (2014) (internal citation and quotation marks omitted); *see* N.C. R. App. P. 10(a)(1) (2017). This rule of preservation also applies to constitutional challenges raised at an SBM hearing. *See State v. Stroessenreuther*, ___ N.C. App. ___, ___, 793 S.E.2d 734, 736-37 (2016) (holding that the trial court must "engage in a reasonableness inquiry once [the defendant has] asserted his Fourth Amendment claim").

We agree with the State's assertion that the cold record lacks evidence of an express objection lodged by Defendant. Nonetheless, it is apparent that the issue of

a *Grady* hearing was contemplated by the parties and passed on by the trial court. At the outset of the 8 March 2017 hearing, the prosecutor stated as follows:

> The matter is back before this Court for determination of satellite-based monitoring. . . . It was a two-part hearing, one based on his conviction as to whether or not . . . it was an offense such that he would be placed on lifetime monitoring. . . . [T]he second part of the hearing was to hold a hearing to determine that the satellite-based monitoring was reasonable in light of the Grady decision and the Fourth Amendment.
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> . . .
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> Well, in addition to that, based on the evidence that was presented during the [29 June 2016] hearing as to the reasonableness of the satellite-based monitoring, the Court has to make a determination now that the monitoring at issue complies with the Fourth Amendment, that it is reasonable under the Fourth Amendment, State vs. Grady, to make particular findings. The Court would need to do that at this point prior to ordering the satellite-based monitoring. That's based on the Grady decision.

The prosecutor then proceeded to summarize purported evidence regarding the reasonableness of lifetime SBM, and the trial court found that it was reasonable.

The dialogue quoted above reflects that the issue of whether SBM constituted a reasonable search pursuant to *Grady* was raised by the State during the hearing and passed on by the trial court. The State cannot now argue that the issue was waived. Moreover, we have held that constitutional issues were preserved where implicitly raised before the trial court. *See State v. Murphy*, 342 N.C. 813, 822, 467 S.E.2d 428, 434 (1996) (holding a constitutional issue was preserved and properly

before the trial court where it was not specifically argued by the defendant but implicitly raised); *State v. Spence*, 237 N.C. App. 367, 371, 764 S.E.2d 670, 675 (2014) (holding that where an objection was apparent from the context, it was preserved). Because the record reflects the *Grady* issue was implicitly raised before the trial court, we hold that the issue was preserved for appellate review.

2. Reasonableness Inquiry

We now consider whether the trial court properly addressed the Fourth Amendment issue. In *Grady*, the United States Supreme Court held that North Carolina's SBM program effects a Fourth Amendment search. *Id.* at ___, 191 L. Ed. 2d at 461-62. However, the Supreme Court noted that the Fourth Amendment prohibits only unreasonable searches, and prior to the *Grady* decision, our courts had not determined whether SBM monitoring was reasonable. *Id.* at __, 191 L. Ed. 2d at 462-63. Therefore, the Supreme Court remanded *Grady* for such a determination. *Id.* at __, 191 L. Ed. 2d at 462-63. This Court subsequently held that the trial court must "determine, based on the totality of the circumstances, if the SBM program is reasonable when properly viewed as a search." *State v. Blue*, ___ N.C. App. ___, ___, 783 S.E.2d 524, 527 (2016). Thus, the determination must be more than a conclusory statement that the court considered *Grady* and concluded that lifetime SBM monitoring constitutes a reasonable search or seizure of the person. *State v. Morris*, ___ N.C. App. ___, ___, 783 S.E.2d 528, 529-530 (2016). This Court has also made it

clear that "the State shall bear the burden of proving that the [satellite-based monitoring] program is reasonable." *Blue*, ___ N.C. App. at ___, 783 S.E.2d at 527.

Here, the State failed to present any evidence regarding the nature of the SBM program. In the hearing that resulted in the SBM order, eight months later, the State inaccurately represented that a probation officer had testified in the earlier hearing, when, in fact, the probation officer had not testified, and the State had presented no evidence regarding the SBM program. *See Ronald G. Hinson Elec., Inc. v. Union Cnty. Bd. of Educ.*, 125 N.C. App. 373, 379, 481 S.E.2d 326, 330 (1997) (noting that unsworn statements by a party's attorney at trial do not constitute evidence).

Without any evidence, the trial court had no support for its finding that SBM was reasonable. In *Blue* and *Morris*, we held that the fact of a conviction alone and a conclusory statement that the search was reasonable failed to comply with the Supreme Court's mandate in *Grady* that the determination be based on the totality of the circumstances. *Blue*, ___ N.C. App. at ___, 783 S.E.2d at 527; *Morris*, ___ N.C. App. at ___, 783 S.E.2d at 529-30. *Blue* and *Morris* are controlling here.

The State concedes that reversal of the trial court's order, without remand, is appropriate. We agree. This Court has held that reversal is appropriate where the State fails to present evidence necessary to support a finding of reasonableness for SBM. *State v. Greene*, __ N.C. App. __, __, 806 S.E.2d 343, 345 (2017). "[T]he nature of the State's burden [is] no longer uncertain . . . [as] *Blue* and *Morris* made clear that

a case for satellite-based monitoring is the State's to make." *Id.* at __, 806 S.E.2d at 345. Because the State concedes that it failed to present any evidence as to the reasonableness for SBM, we hold remand is inappropriate.

Conclusion

For the foregoing reasons, we reverse the order of the trial court.

REVERSED.

Judges BRYANT and HUNTER concur.

Report per Rule 30(e).