

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1295

Filed: 6 August 2019

Rowan County, Nos. 15 CRS 54421–22

STATE OF NORTH CAROLINA

v.

JESSE JAMES TUCKER

Appeal by defendant from order entered 4 April 2018 by Judge Anna Mills Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 5 June 2019.

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.

DIETZ, Judge.

Defendant Jesse James Tucker appeals the trial court’s imposition of lifetime satellite-based monitoring. We vacate the trial court’s order for the reasons discussed in *State v. Griffin*, __ N.C. App. __, 818 S.E.2d 336 (2018).

In *Griffin*, this Court held that the Fourth Amendment prohibits a trial court from imposing lifetime satellite-based monitoring on a convicted sex offender unless the State presents evidence that this type of monitoring “is effective to protect the public from sex offenders.” *Id.* at __, 818 S.E.2d at 337. The Court further held that

the efficacy of satellite-based monitoring is not self-evident—that is, that the State cannot rely solely on the common-sense assumption “that an offender’s awareness his location is being monitored does in fact deter him from committing additional offenses.” *Id.* at ___, 818 S.E.2d at 341. Likewise, the Court held that the State cannot rely on “decisions from other jurisdictions stating that [satellite-based monitoring] curtails sex offender recidivism.” *Id.* Simply put, after *Griffin*, trial courts cannot impose satellite-based monitoring unless the State presents actual evidence—such as “empirical or statistical reports”—establishing that lifetime satellite-based monitoring prevents recidivism. *Id.*

Here, the State did not present the sort of evidence required by *Griffin*—likely because the hearing in this case occurred before this Court decided *Griffin*. Nevertheless, *Griffin* is controlling precedent on direct appeal. Although the Supreme Court stayed the judgment of this Court in *Griffin*, it did not stay our mandate. *See State v. Griffin*, ___ N.C. ___, 817 S.E.2d 210 (2018). Moreover, *Griffin* largely relies on the reasoning of *State v. Grady*, ___ N.C. App. ___, ___, 817 S.E.2d 18, 27–28 (2018) (*Grady II*), which the Supreme Court has not stayed. Thus, we are bound by the *Griffin* holding in this appeal. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We therefore vacate the imposition of lifetime satellite-based monitoring in this case.

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Opinion of the Court

We note that there is disagreement amongst the judges of this Court concerning the holdings of *Griffin* and its companion cases, and that review of several of those cases is pending in our Supreme Court. *See, e.g., Griffin*, __ N.C. App. at __, 818 S.E.2d at 342–44 (Bryant, J., dissenting); *Grady*, __ N.C. App. at __, 817 S.E.2d at 28–31 (Bryant, J., dissenting); *State v. Westbrook*, __ N.C. App. __, 817 S.E.2d 794, 2018 WL 4200974, at *4–7 (2018) (Dillon, J. dissenting) (unpublished); *State v. White*, __ N.C. App. __, 817 S.E.2d 795, 2018 WL 4200979, at *9 (2018) (Dillon, J., dissenting) (unpublished); *State v. Gordon*, __ N.C. App. __, __, 820 S.E.2d 339, 349–50 (2018) (Dietz, J., concurring in the judgment). Thus, although we reject the State’s arguments as squarely precluded by *Griffin* and *Grady II*, we observe that the State has preserved those arguments for further review in the Supreme Court.

VACATED.

Judge HAMPSON concurs.

Judge BERGER dissents with separate opinion.

BERGER, Judge, dissenting in separate opinion.

This Court is compelled by *Griffin* to vacate the trial court’s order of lifetime satellite-based monitoring in this case. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). “Our panel is following [*Griffin*], as we should. However, I write separately to dissent because I believe [*Griffin*] is wrongfully decided[.]” *Watson v. Joyner-Watson*, ___ N.C. ___, ___, 823 S.E.2d 122, 126, (*Dillon, J., dissenting*) (2018).¹

Here, Defendant entered an *Alford* plea to two counts of indecent liberties with a child. The State’s factual recitation during the plea tended to show that there were two separate victims in this case, one was a seven year old girl and the other a nine year old girl. Defendant exposed his penis to the seven year old victim and instructed her to touch his penis. Defendant also pulled down the seven year old’s pants and underwear and performed oral sex on the victim. As for the nine year old victim, the State’s factual showing established that Defendant rubbed the girl’s vagina. In

¹ *Griffin* misconstrued *Grady II*. Underlying the analysis in *Grady II* is a totality of the circumstances approach for determining the reasonableness of imposing lifetime SBM, as instructed by the U.S. Supreme Court. One factor that could be considered includes information regarding the efficacy of North Carolina’s SBM program. But this is not the only means by which the State could establish reasonableness. *Griffin*, however, effectively eliminated the individualized determinations clearly called for in *Grady II* in favor of a single factor test that solely concerns efficacy showings unique to North Carolina’s program.

It could be argued that this Court, upon a proper review, could simply take judicial notice that the SBM program is beneficial in deterring sex offenders from re-offending. Upon such a finding, *Griffin* would forever be satisfied. Such a result, however, would be contrary to the individualized determinations called for by the Fourth Amendment, the U.S. Supreme Court’s directive in *Grady I*, and this Court’s prior holding in *Grady II*.

addition, Defendant admitted that he was a recidivist, having been previously convicted of indecent liberties with a child in 2004.

When the trial court conducted a hearing on imposing lifetime SBM, the State presented a host of statistical information which showed high rates of recidivism among sex offenders. Relevant here, one study showed that sex offenders who victimized children and had more than one prior arrest had a recidivism rate of 44.3 percent. In addition, the State provided a North Carolina recidivism study of 988 sex offenders which showed 26 percent of registered sex offenders were rearrested. Based upon this showing, the trial court found that Defendant was a recidivist and that he committed a sexually violent offense; that the purpose of SBM was to deter future criminal acts by Defendant against children; and that imposing lifetime SBM on Defendant was reasonable.

In 2006, the General Assembly established the “continuous satellite-based monitoring system” to monitor certain sex offenders. Individuals subject to SBM include defendants who were convicted of “reportable convictions” and were (1) classified as sexually violent predators, (2) recidivists, or (3) “convicted of an aggravated offense.” N.C. Gen. Stat. § 14-208.40(a)(1) (2017). If a trial court determines, based upon evidence presented by the prosecutor, that a convicted sex offender was “classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of G.S. 14-27.23 or G.S. 14-27.28, the court

shall order the offender to enroll in a satellite-based monitoring program for life.” N.C. Gen. Stat. § 14-208.40A (2017). By the plain language of Section 14-208.40A, Defendant would be required to enroll in lifetime SBM.

However, the United States Supreme Court has stated that the government “conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements.” *Grady v. North Carolina*, 135 S. Ct. 1368, 1370, 191 L. Ed. 2d 459, 462 (2015). Thus, because North Carolina’s SBM “program is plainly designed to obtain information[,]” monitoring through an ankle bracelet pursuant to the program constitutes a search under the Fourth Amendment. *Id.* at 1371, 191 L. Ed. 2d at 461 (2015). The Supreme Court stated in *Grady* that “[t]he 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.” *Id.* at 1371, 191 L. Ed. 2d at 462.

Thus, the U.S. Supreme Court’s opinion in *Grady v. North Carolina* merely applied the Fourth Amendment’s requirement of reasonableness to SBM decisions. This should not have disturbed our SBM jurisprudence to the extent that it has. However, *Griffin* seized upon the opportunity provided by *Grady I* and *Grady II* to reimagine the Fourth Amendment, and this Court has been moving the goal posts for trial judges and prosecutors at every turn.

Reasonableness under the Fourth Amendment is intended to be a totality of the circumstances inquiry that includes consideration of “the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.” *Id.* This Court has acknowledged that recidivist sex offenders have an expectation of privacy that is “appreciably diminished as compared to law-abiding citizens.” *Grady II* ___ N.C. App. at ___, 817 S.E.2d at 28.

In *Griffin*, a case that did not involve a recidivist sex offender or lifetime SBM, this Court abandoned the reasonableness requirement based upon the totality of the circumstances familiar to Fourth Amendment inquiries, and instead manufactured a singular means by which reasonableness could be established. *Griffin’s* new requirement is not only contrary to Fourth Amendment jurisprudence, but as the majority points out, lacking in common sense. Judge Bryant dissented in two recent SBM cases, including *Griffin*. Her reasoning provides the proper framework for analyzing SBM cases pursuant to the United States Supreme Court’s direction in *Grady*. See *Grady II*, ___ N.C. App. ___, 817 S.E.2d 18 (*Bryant, J., dissenting*); *Griffin*, ___ N.C. App. ___, 818 S.E.2d 336 (*Bryant, J., dissenting*).

Here, Defendant is not simply susceptible of re-offending; Defendant actually re-offended. Defendant is an admitted recidivist who victimized two more children. Further, the trial court determined that Defendant engaged in a sexually violent offense. Defendant has a diminished expectation of privacy, and use of an ankle

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BERGER, J., dissenting

monitor is a lesser intrusive means of monitoring Defendant and collecting relevant data. The State has a legitimate governmental interest in protecting children and communities from convicted sex offenders, and the government's interest outweighs Defendant's diminished privacy interests. Because imposition of lifetime SBM is reasonable under the circumstances, and thus reasonable under the Fourth Amendment, *Griffin's* required showing is irrelevant to this individual defendant.

The trial court's order of lifetime SBM for Defendant should be affirmed.