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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-507

Filed: 5 May 2020

Lenoir County, No. 14 CRS 51470

STATE OF NORTH CAROLINA

v.

JAMES ALTON WILLIS, JR., Defendant.

Appeal by Defendant from order entered 6 March 2018 by Judge Imelda J. Pate in Lenoir County Superior Court. Heard in the Court of Appeals 28 November 2018.

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

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Defendant-Appellant.*

McGEE, Chief Judge.

James Alton Willis, Jr. (“Defendant”), appeals from the trial court’s order requiring him to submit to satellite-based monitoring (“SBM”) for the remainder of his natural life. We reverse the trial court’s order.

**I. Factual and Procedural Background**

Defendant was convicted on 28 January 2008 of one count of indecent liberties with a child. Subsequently, on 10 November 2014, Defendant was indicted by a grand

jury on one count of indecent liberties with a child pursuant to N.C.G.S. § 14-202.1(a)(1) and one count of a lewd and lascivious act upon a child under N.C.G.S. § 14-202.1(a)(2).

Defendant pleaded guilty to one count of indecent liberties with a child on 8 January 2015, and the remaining charge was dismissed. Defendant was sentenced to a term of 21 to 35 months imprisonment.

A “bring-back” hearing was held on 11 October 2017, pursuant to N.C.G.S. § 14-208.40B for a determination regarding whether Defendant was required to enroll in SBM. At the hearing, the State presented evidence that Defendant qualified as a recidivist and offered testimony from Officer Keela Haynes (“Officer Haynes”), a probation/parole officer specializing in sex offender cases. The trial court took judicial notice of several cases from other jurisdictions before ruling from the bench:

[n]ow, pursuant to the evidence that has been presented at this hearing today, the arguments of counsel, the [c]ourt finds that based on the totality of the circumstances analysis that satellite based monitoring of the defendant is a reasonable search in this case. The [c]ourt has considered the defendant’s argument that satellite based monitoring is unconstitutional. The [c]ourt has considered all of the defendant’s arguments today and the [c]ourt rejects those arguments.

Defendant’s counsel objected, stating:

[s]pecifically, Your Honor, just to put on the record *I feel that this really wasn’t an evidentiary hearing where the State provided evidence based on the reasonableness of this.* We feel like that’s required. Certainly not trying to step on

Your Honor's toes, but we do feel like that certain evidence that is required for the State to meet their burden of reasonableness has not been provided here, and therefore we give notice of appeal.

(Emphasis added).

The trial court entered an order on 6 March 2018 (the “SBM order”) requiring Defendant to enroll in SBM for the remainder of his natural life. The order established that “Defendant . . . met the criteria for a recidivist as defined in N.C.G.S. § 14-208.6(2b)[,]<sup>1</sup>” summarized the testimony of Officer Haynes in regard to her training, the restrictions of an enrollee to enter certain “exclusion zones,” and her concern that Defendant may re-offend, and discussed two out-of-state cases dealing with SBM. The trial court concluded as a matter of law that “[p]ursuant to the evidence presented at this hearing, the arguments of counsel, and the pertinent law on this issue, the [c]ourt finds that based upon the totality of the circumstances analysis, SBM of Defendant is a reasonable search.” Defendant appeals.

## **II. Standard of Review**

In reviewing an SBM order, “we are ‘strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the judge’s ultimate conclusions of law.’” *State v. Thomas*, 225 N.C. App. 631, 632, 741 S.E.2d 384, 386 (2013) (quoting *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008)). We review *de novo*

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<sup>1</sup> A “recidivist” is defined as “[a] person who has a prior conviction for an offense that is described in G.S. 14-208.6(4).” N.C.G.S. § 14-208.6(2b) (2017).

the trial court’s conclusions of law, including whether SBM constitutes a reasonable search under the Fourth Amendment. *State v. Martin*, 223 N.C. App. 507, 508, 735 S.E.2d 238, 238 (2012).

### III. Analysis

Defendant contends that the trial court erred by ordering SBM without sufficient evidence from the State meeting its burden of proving that the search was reasonable under the Fourth Amendment. We agree.

In *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) (“*Grady III*”), the North Carolina Supreme Court modified and affirmed this Court’s opinion in *State v. Grady*, \_\_\_ N.C. App. \_\_\_, 817 S.E.2d 18 (2018) (“*Grady II*”). *Grady III* held that as to the specific and limited class of offenders—registered sex offenders subject to SBM solely on the basis of recidivism who are otherwise not under State supervision—the imposition of lifetime SBM was an unreasonable warrantless search in violation of the Fourth Amendment. *Grady III*, 372 N.C. at 547, 831 S.E.2d at 570 (“[T]he ‘reach’ of our holding extends to applications of mandatory lifetime SBM of unsupervised individuals authorized solely on a finding that the individual is a recidivist and without any findings that the individual was convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen, or is a sexually violent predator.”).

#### A. *Griffin II*

This Court recently addressed the application of *Grady III* in the context of a non-recidivist offender subject to post-release supervision in *State v. Griffin*, \_\_\_ N.C. App. \_\_\_, No. COA17-386-2, 2020 WL 769356 (Feb. 18, 2020) (“*Griffin II*”).<sup>2</sup> Mr. Griffin entered an *Alford* plea in 2004 to a first-degree sex offense with a child who lived in his household. *Id.* at \*1. He was released from prison eleven years later on a five-year term of post-release supervision. *Id.* at \*1-2. The trial court held a “bring-back” hearing in 2016 to determine if Mr. Griffin was eligible for SBM under N.C.G.S. § 14-208.40(a)(2).<sup>3</sup> *Id.* at \*2. During the hearing, the State offered evidence that Mr. Griffin had presented a “moderate-low” risk of recidivism on his STATIC-99 assessment. *Id.* at \*2. In addition, Mr. Griffin’s probation officer testified that, although Mr. Griffin had not completed the required sex offender treatment, he had not committed any new criminal offenses or violated the terms of his probation since being released from prison. *Id.* at \*2. The probation officer “described the physical

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<sup>2</sup> In *State v. Griffin*, \_\_\_ N.C. App. \_\_\_, 818 S.E.2d 336 (2018) (“*Griffin I*”), this Court held that the State failed to demonstrate the reasonableness of subjecting Mr. Griffin to a thirty-year term of SBM. Following its decision in *Grady III*, the Supreme Court remanded *Griffin I* to this Court “for further consideration in light of . . . [*Grady III*].”

<sup>3</sup> An offender sentenced to SBM pursuant to N.C.G.S. § 14-208.40 must: (1) be convicted of a reportable conviction as defined by N.C.G.S. § 14-208.6(4); (2) be required to register under Part 2 of Article 27A of Chapter 14 of the General Statutes; (3) have committed an offense involving the physical, mental, or sexual abuse of a minor; and (4) be determined by the trial court to require the highest possible level of supervision and monitoring based on a risk assessment conducted by the Division of Adult Correction and Juvenile Justice. N.C.G.S. § 14-208.40(a)(2) (2017). If an offender meets these criteria, the trial court “shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.” N.C.G.S. § 14-208.40B(c) (2017) (emphasis added).

characteristics and operation of the SBM device[;]" however, "[t]he State did not introduce any evidence regarding how it would use the SBM data or whether SBM would be effective in protecting the public from potential recidivism by [the] [d]efendant." *Id.* at \*2. The trial court determined that the State's evidence coupled with the fact that Mr. Griffin had held a "position of trust" with the victim was sufficient to warrant the imposition of SBM for a period of thirty years and entered an SBM order to that effect. *Id.* at \*2. Mr. Griffin appealed.

In order "to discern the scope, effect, and import of *Grady III*[,] *Griffin II* provided a thorough discussion of both *Grady II* and *Grady III*. *Id.* at \*2. This Court explained that because Mr. Griffin was on post-release supervision, was convicted of an offense involving the physical, mental, or sexual abuse of a minor, and was sentenced to SBM for a thirty-year period, he fell outside of the facial aspect of *Grady III*'s holding. *Id.* at \*5. However, we held that "[a]lthough *Grady III* does not compel the result we must reach in this case, its reasonableness analysis does provide us with a roadmap to get there." *Id.* at \*6. We explained that the same factors were considered by our appellate courts in both *Grady II* and *Grady III* to determine whether, under the totality of the circumstances, SBM was a reasonable warrantless search of Mr. Grady, namely:

- (1) the nature of the defendant's legitimate privacy interests in light of his status as a registered sex offender;
- (2) the intrusive qualities of SBM into the defendant's privacy interests; and
- (3) the State's legitimate interests in

conducting SBM monitoring and the effectiveness of SBM in addressing those interests.

*Id.* at \*3 (internal citations omitted). Accordingly, we applied the factors utilized by this Court in *Grady II* and the Supreme Court in *Grady III* to the facts of Mr. Griffin's appeal. *Id.* at \*6 (citing *Grady III*, 372 N.C. at 527, 534, 538, 831 S.E.2d at 557, 561, 564).

First, we addressed Mr. Griffin's privacy interest. *Id.* at \*6. We explained that, by virtue of being on the sex offender registry and being subject to post-release supervision, Mr. Griffin has "a diminished expectation of privacy in some respects." *Id.* at \*6. However, "[h]is appearance on the sex offender registry does not mean . . . that his rights to privacy in his person, his home, and his movements are forever forfeit." *Id.* at \*6 (citing *Grady III*, 372 N.C. at 534, 831 S.E.2d at 561). We noted that although those "rights may be appreciably diminished during his five-year term of post-release supervision, that is not true for the remaining 25 years of SBM imposed[.]" *Id.* at \*6. This Court then wrote that, following his five-year term, Mr. Griffin "will enjoy appreciable, recognizable privacy interests that weigh against the imposition of SBM for the remainder of [his] thirty-year term." *Id.* at \*6.

Second, we addressed the intrusive nature of SBM. *Id.* at \*6. Noting that "the physical qualities of the monitoring device used . . . appear largely similar to those in *Grady III*, and thus meaningfully conflict with [Mr. Griffin's] privacy rights[.]" *id.* at \*7, we also explained that, like Mr. Grady, "SBM's ability to track [Mr. Griffin's]

location is ‘uniquely intrusive,’ and thus weighs against the imposition of SBM.” *Id.* at \*7 (quoting *Grady III*, 372 N.C. at 537, 831 S.E.2d at 564 (internal citation omitted)). We then distinguished the lifetime SBM imposed on Mr. Grady from the thirty-year term of SBM imposed on Mr. Griffin, explaining that, “[i]n this aspect, the intrusion of SBM on [Mr. Griffin] is greater than the intrusion imposed [on Mr. Grady] because[,] unlike an order for lifetime SBM,<sup>4</sup> which is subject to periodic challenge and review, an order imposing SBM for a period of years is not subject to later review.” *Id.* at \*7 (internal quotation marks and citations omitted). From this analysis, this Court held that “the intrusive nature of SBM as implemented in this case weighs against the reasonableness of the warrantless search ordered [on Mr. Griffin].” *Id.* at \*7.

Finally, we considered the State’s interests in conducting SBM and the effectiveness of SBM in addressing those interests. We acknowledged that “the State has advanced legitimate interests in favor of SBM” which include “protecting the public from sex offenders, reducing recidivism, solving crimes, and deterring

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<sup>4</sup> Pursuant to N.C.G.S § 14-208.43, an offender such as Mr. Grady, “who is required to submit to satellite-based monitoring for the offender’s life[,] may file a request for termination of monitoring requirement with the Post-Release Supervision and Parole Commission.” N.C.G.S § 14-208.43(a) (2017). An offender subject to SBM for a period of years does not have this same opportunity. *Griffin II*, 2020 WL 769356, at \*7.



criminality.” *Id.* at \*7 (internal citations omitted). However, although the State has argued these valid objectives,

‘the State bears the burden of proving the reasonableness of a warrantless search’ which, in the context of SBM, includes ‘the burden of coming forward with some evidence that its SBM program assists in apprehending sex offenders, deters or prevents new sex offenses, or otherwise protects the public.’ [*Grady III*, 372 N.C.] at 543–44, 831 S.E.2d at 568. The State’s failure to produce any evidence in this regard ‘weighs heavily against a conclusion of reasonableness.’ *Id.* at 543, 831 S.E.2d at 567.

*Id.* at \*7 (brackets omitted).

In *Griffin II*, the State failed to produce any record evidence demonstrating that “SBM is effective in accomplishing any of the State’s legitimate interests.” *Id.* at \*7 (citation omitted). The State offered testimony tending to show Mr. Griffin betrayed the trust of his minor victim and did not participate in the SOAR program; however, the SBM order did not indicate that the trial court believed this behavior increased the likelihood that Mr. Griffin would recidivate. *Id.* at \*7. Likewise, the State’s production of the STATIC-99 revealing a “moderate-low risk” of reoffending was not sufficient evidence to support the imposition of SBM on Mr. Griffin. *Id.* at \*7. This Court explained that although the State has a legitimate interest in monitoring Mr. Griffin during his five-year term of post-release supervision, that interest “is already accomplished by a mandatory condition of post-release supervision imposing that very thing.” *Id.* at \*8 (citing N.C.G.S. § 15A-1368.4(b1)(7))

(2017)).<sup>5</sup> As a result, we concluded that the State “failed to carry its burden to produce evidence that the thirty-year term of SBM imposed in this case is effective to serve legitimate interests.” *Id.* at \*8.

This Court ultimately resolved *Griffin II* by considering the aforementioned factors under the totality of the circumstances in order to determine whether the imposition of SBM on Mr. Griffin for a thirty-year period was reasonable. *Id.* at \*8. After stating that Mr. Griffin has “appreciable privacy interests in his person, his home, and his movements—even if those interests are diminished for five of the thirty years that he is subject to SBM[,]” we explained that his privacy interests are “substantially infringed by the SBM order imposed in this case.” *Id.* at \*8. We concluded that, “these factors caution strongly against a conclusion of reasonableness and they are not outweighed by evidence of any legitimate interest served by monitoring [Mr. Griffin] given the State’s failure to meet its burden showing SBM’s efficacy in accomplishing the State’s professed aims.” *Id.* at \*8. Therefore, we held that, under the totality of the circumstances, the imposition of SBM on Mr. Griffin for a thirty-year period constitutes an unreasonable search under the Fourth Amendment and we reversed the trial court’s order. *Id.* at \*8.

*B. Effect of Grady III and Griffin II on This Appeal*

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<sup>5</sup> N.C.G.S. § 15A-1368.4(b1)(7) establishes SBM monitoring as a required condition of post-release supervision for registered sex offenders and those convicted of sexual abuse of a minor.

In the present case, as in *Grady III* and *Griffin II*, we must determine whether the imposition of SBM on Defendant is a reasonable Fourth Amendment search. Defendant, like Mr. Grady, is a recidivist facing lifetime monitoring; however, unlike Mr. Grady, Defendant is subject to post-release supervision for a period of five years, placing his circumstances outside of the limited facial holding of *Grady III*. Accordingly, as we did in *Griffin II*, we employ *Grady III* as a roadmap, “reviewing Defendant’s privacy interests and the nature of SBM’s intrusion into them before balancing those factors against the State’s interests in monitoring Defendant and the effectiveness of SBM in addressing those concerns.” *Id.* at \*6.

1. Defendant’s Privacy Interest

Like Mr. Griffin, Defendant is subject to post-release supervision for a period of five years and, therefore, his “rights may be appreciably diminished during his five-year term of post-release supervision[.]” *Id.* at \*6. However, after the five-year period ends, Defendant “will enjoy appreciable, recognizable privacy interests that weigh against the imposition of SBM for the remainder of [his lifetime] term.” *Id.* at \*6. Also, although Defendant will remain on the sex offender registry after his post-release supervision expires, this does not mean “that his rights to privacy in his person, his home, and his movements are forever forfeit.” *Id.* at \*6 (citing *Grady III*, 372 N.C. at 534, 831 S.E.2d at 561).

2. Intrusive Nature of SBM

As was the case in *Griffin II*, “the physical qualities of the monitoring device . . . meaningfully conflict with Defendant’s physical privacy rights.” *Id.* at \*7 (citing *Grady III*, 372 N.C. at 535–37, 831 S.E.2d at 562–63). Moreover, because SBM tracks Defendant’s location, it “is ‘uniquely intrusive,’ . . . and thus weighs against the imposition of SBM.” *Id.* at \*7 (quoting *Grady III*, 372 N.C. at 537, 831 S.E.2d at 564). In terms of duration, the imposition of SBM for Defendant’s lifetime is more intrusive than the thirty-year term of SBM imposed on Mr. Griffin. Additionally, because Defendant is a recidivist, he was sentenced to lifetime SBM *without* the benefit of a risk assessment or an individualized determination that he “requires the highest possible level of supervision and monitoring[.]” N.C.G.S. § 14-208.40A(e). As explained in *Grady III*,

[i]n contrast to the SBM provisions governing other offenders, which include an individualized ‘risk assessment’ and judicial determinations regarding whether the individual ‘requires the highest possible level of supervision and monitoring,’ and, if so, for how long, N.C.G.S. §§ 14-208.40A(d)-(e), -208.40B(c) . . . , the provisions governing recidivists present no opportunity for determinations by the court regarding what particular risk, if any, is posed by the individual and whether a particular duration of SBM will, in any meaningful way, serve the State’s interest in combatting that risk.

*Grady III*, 372 N.C. at 831 S.E.2d at 569 (internal citation omitted). In a different regard, Defendant’s lifetime SBM is less intrusive than Mr. Griffin’s thirty-year term because Defendant, unlike Mr. Griffin, is afforded an opportunity to petition the Post-

Release Supervision and Parole Commission for termination of his SBM. *See* N.C.G.S. § 14-208.43(a). Nonetheless, “such an opportunity [is] not equivalent to or a substitute for judicial review of a warrantless search.” *Griffin II*, 2020 WL 769356, at \*4 n.4 (citing *Grady III*, 372 N.C. at 534, 831 S.E.2d at 562). Therefore, “the intrusive nature of the SBM as implemented in this case weighs against the reasonableness of the warrantless search ordered below.” *Id.* at \*7.

### 3. State’s Interest

At the “bring-back” hearing, the State recognized that it bore the burden of proving the reasonableness of imposing SBM on Defendant. The State presented evidence, and the trial court found in its order, that Defendant was a recidivist pursuant to N.C.G.S. § 14-208.6(4). The State also proffered testimony from Officer Haynes, which the trial court summarized in the SBM order, regarding her training, the restrictions of an enrollee to enter certain “exclusion zones,” and her concern that Defendant may re-offend. The State argued that Defendant had a diminished expectation of privacy and “any sort of interest [Defendant] may have is significantly outweighed by the government interest in protecting citizens especially due to the fact that this defendant has proven that he continues to commit . . . similar crimes[.]” Although the State advanced its interest of protecting the public, it did not present any evidence regarding *how* SBM successfully protects the public from sex offenders.

As discussed above, “[t]he State has the burden of coming forward with some evidence that its SBM program assists in apprehending sex offenders, deters or prevents new sex offenses, or otherwise protects the public.” *Grady III*, 372 N.C. at 543–44, 831 S.E.2d at 568. “The State’s failure to produce any evidence in this regard ‘weighs heavily against a conclusion of reasonableness.’” *Griffin II*, 2020 WL 769356, at \*7 (quoting *Grady III*, 372 N.C. at 543, 831 S.E.2d at 567 (brackets omitted)). Although the State offered evidence of Defendant’s status as a recidivist, that finding, standing alone, is insufficient evidence that SBM of Defendant is a reasonable Fourth Amendment search. *See Grady III*, 372 N.C. at 510, 831 S.E.2d at 546 (“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.” (quoting *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L.Ed. 2d 459, 462 (2015) (per curiam))). Moreover, the State failed to elicit any testimony from Officer Haynes regarding the efficacy of SBM in achieving the government’s goals. Finally, the arguments advanced by the State at the hearing were simply conclusory legal arguments untethered to facts or documentary evidence. *See State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) (explaining that “it is axiomatic that the arguments of counsel are not evidence”). Thus, the State failed to provide *any* evidence that SBM helps the State achieve any of its stated purposes, which include reducing recidivism, aiding investigators in solving crime,

and deterring future criminal acts. *See Griffin II*, 2020 WL 769356, at \*7. The absence of such evidence “weighs heavily against a conclusion of reasonableness” in this case. *Grady III*, 372 N.C. at 543, 831 S.E.2d at 567.

4. Reasonableness of SBM Under the Totality of the Circumstances

We hold that even though Defendant may have diminished privacy interests for the five years he is on post-release supervision, “the circumstances reveal that Defendant has *appreciable* privacy interests in his person, his home, and his movements[.]” *Griffin II*, 2020 WL 769356, at \*8 (citing *Grady III*, 372 N.C. at 534, 831 S.E.2d at 561 (emphasis added)). The imposition of lifetime SBM on Defendant, however, “substantially infringe[s]” on Defendant’s appreciable privacy interests. *Id.* at \*8. “Taken together, these factors caution strongly against a conclusion of reasonableness, and they are not outweighed by evidence of any legitimate interest served by monitoring Defendant given the State’s failure to meet its burden showing SBM’s efficacy in accomplishing the State’s professed aims.” *Id.* at \*8. As a result, we hold that the imposition of lifetime SBM on Defendant constitutes an unreasonable warrantless search under the Fourth Amendment and we reverse the SBM order. *See Id.* at \*8.

IV. Conclusion

STATE V. WILLIS

*Opinion of the Court*

Because we hold that, under the totality of the circumstances, the imposition of lifetime SBM on Defendant constitutes an unreasonable warrantless search in violation of the Fourth Amendment, we reverse the trial court's order.

REVERSED.

Judge YOUNG concurs.

Judge BERGER concurs with separate opinion.

Report per Rule 30(e).



BERGER, Judge, concurring in separate opinion.

I concur in result only.

As Justice Newby presciently wrote, *Grady III*'s "sweeping opinion could be used to strike down every category of lifetime monitoring under the SBM statute." *State v. Grady*, 372 N.C. 509, 551, 831 S.E.2d 542, 573 (2019) (*Newby, J., dissenting*). A panel of this Court in *Griffin II* seized upon the sweeping language in *Grady III* to move us down that road quickly. Despite acknowledging that *Grady III* was not directly on point, *Griffin II* threw out an SBM order using *Grady III* language.

The majority here misapprehends Fourth Amendment analysis but does so based on the SBM jurisprudence of our appellate courts. Under *Grady III* and *Griffin II*, we now conduct reasonableness inquiries for SBM in name only. We no longer look at the totality of the circumstances, and our analysis only vaguely resembles what is required by the Fourth Amendment. Current SBM jurisprudence goes far afield from what was envisioned by the United States Supreme Court in *Grady I*.

The majority correctly notes that *Grady III* should be the starting point for our analysis. However, *Grady III* was a narrowly tailored holding by our Supreme Court that held SBM was unconstitutional for sex offenders who are unsupervised at the time they are subject to entry of an SBM order. *State v. Grady*, \_\_\_ N.C. \_\_\_, \_\_\_, 831 S.E.2d 542, 553 (2019). Specifically, the Court stated that

the State's SBM program is unconstitutional in its application to all individuals in the same category as defendant—specifically, individuals who are subject to mandatory lifetime SBM based solely on their status as a statutorily defined “recidivist” who have completed their prison sentences and are *no longer supervised by the State through probation, parole, or post-release supervision*.

*Id.* at \_\_\_, 831 S.E.2d at 553 (footnote omitted) (emphasis added).

Here, Defendant was on post-release supervision when he was brought back to determine if SBM should be imposed pursuant to N.C. Gen. Stat. § 14-208.40B. By definition, he is not among the class of sex offenders for whom the *Grady III* loophole applies. Put another way, Defendant is a recidivist sex offender for whom SBM may be appropriate.

The Supreme Court of the United States determined that North Carolina's SBM program need only satisfy the reasonableness requirement of the Fourth Amendment. *Grady v. North Carolina*, 575 U.S. 306, 310 (2015). Here, the trial court determined that imposition of lifetime SBM was reasonable under the totality of the circumstances. The trial court's detailed order clearly sets forth that Defendant meets the statutory requirements for implementation of SBM and that SBM was reasonable under the specific facts of Defendant's case.

The trial court's order is filled with common sense; not the hyper-technicalities seen so often in recent SBM cases. The trial court stated:

In determining whether SBM is reasonable, *State v. Blue*, No. COA15-837, 2016 N.C. App. LEXIS 293 (Ct. App. Mar.

15, 2016), provides guidance to this Court. In *Blue*, the N.C. Court of Appeals held that the trial court's summary conclusion that the SBM search was reasonable was insufficient and concluded that the trial court should have conducted a totality of the circumstances analysis as outlined in *State v. Grady* "including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Blue*, at 9 (citing *Grady*, 135 S. Ct. 1368, 1369 (2016)). The *Blue* Court, citing the Supreme Court decision in *Samson v. California*, further defined the totality of the circumstances analysis. *Blue*, at 10 (citing *Samson*, 547 U.S. 843, 848, 165 L. Ed. 2d 250, 256 (2006) (holding that "[w]hether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.") . . . . The Court of Appeals also noted that the State bears the burden of proving that the SBM search is reasonable by a preponderance of the evidence. *Blue*, at 8.

Since the *Grady* decision, there have been two cases that provide guidance on whether or not the SBM search is a reasonable one and what factors should be considered. First, in *People v. Hallak*, 873 N.W.2d 811 (Mich. App. 2015), *reversed and remanded in part*, *People v. Hallak*, 876 N.W.2d 523 (Mich. 2016), the Michigan intermediate appellate court determined that the reasonableness of a search "depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Id.* at 825 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S. Ct. 3304, 87 L. Ed. 2d 381) (1985). The *Hallak* court also relied upon decisions of the Michigan appellate courts, noting that "[t]he applicable test in determining the reasonableness of an intrusion is to balance the need to search, in the public interest, for evidence of criminal activity against invasion of the individual's privacy." *Id.* . . .

In applying the test of reasonableness as outlined above, the court analyzed the hardship monitoring represents, finding that “[t]he monitoring does not prohibit defendant from travelling, working, or otherwise enjoying the ability to legally move about as he wishes. Instead, the monitoring device simply records where he has traveled to ensure that he is complying with the terms of his probation and state law. . . . And although this monitoring lasts a lifetime, the Legislature presumably provided shorter prison sentences for these . . . convictions because of the availability of lifetime monitoring. *Id.* at 826. The court continued, “[t]hough it may certainly be that such monitoring of a law abiding citizen would be unreasonable, on balance the strong public interest in the benefit of monitoring those convicted of [second-degree criminal sexual conduct] . . . outweighs any minimal impact on defendant’s reduced privacy interest. *Id.*

The second court to address the issue of reasonableness of the SBM search was the 7<sup>th</sup> Circuit last year. *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016). The *Belleau* court listed several reasons that SBM is not an unreasonable search. The court stated that, “persons who have demonstrated a compulsion to commit very serious crimes and have been civilly determined to have a more likely chance of reoffending must expect to have a diminished right of privacy as a result of the risk of their recidivating - and as Justice Harlan explained in his influential concurrence in the *Katz* case, the only expectation of privacy that the law is required to honor is an “expectation ... that society is prepared to recognize as ‘reasonable.’” *Id.* at 935 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967)).

The *Belleau* court went on to mention other mitigating factors such as the unobtrusiveness of the device, the fact that the device does not reveal the activities of the offender - merely his location, the fact that the location of the offender could be used alternatively to implicate or exonerate defendant of a subsequent crime,

and the fact that similar searches occur in the form of hidden cameras in traffic lights and undercover agents in high drug activity areas. The court also noted that police officers can trail a person without the need for a search warrant. *Belleau*, 811 F.3d at 936.

After considering the above factors, the *Belleau* court remarked on the high rate of recidivism among sex offenders and took notice of a study which found that sex offenders made to wear a GPS device were half as likely as non-monitored offenders to be re-arrested or convicted of a new offense. *Id.* at 936 (citing *Stephen v. Gies*, et al, “Monitoring High-Risk Sex Offenders with GPS Technology: An Evaluation of the California Supervision Program,” Final Report, pp. 3-11, 3-13 (March 2012)). The *Belleau* court concluded, “[g]iven how slight is the incremental loss of privacy from having to wear the ankle monitor, and how valuable to society . . . the information collected by the monitor is” the search in the case of *Belleau* did not violate the Fourth Amendment. *Belleau*, 811 F.3d at 936.

The United States Supreme Court has long recognized the dangers of recidivism in cases of sex offenders. *Smith v. Doe*, 538 U.S. 84, 103 (2003) (“The risk of recidivism posed by sex offenders is frightening and high.”); *McKune v. Lile*, 536 U.S. 24, 34 (2002) (“[s]ex offenders are a serious threat to this nation . . . When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”). Additionally, it is within the purview of state governments to recognize and reasonably react to a known danger in order to protect its citizens. *Samson v. California*, 547 U.S. 843, 848 (2006) (“This Court has acknowledged the grave safety concerns that attend recidivism” and “the Fourth Amendment does not render the States powerless to address these concerns effectively.”).

Defendant's two convictions were found to both qualify as "sexually violent offenses" under N.C.G.S. § 14-208.6(5), which require the defendant to register as a sex offender under Article 27A of Chapter 14 of the North Carolina General Statutes. As a result of his 2015 conviction for taking indecent liberties with a child, another conviction for the same sexually violent offense and an offense involving a minor, Defendant further met the criteria for a recidivist as defined in N.C.G.S. § 14-208.6(2b).

Pursuant to the evidence presented at this hearing, the arguments of counsel, and the pertinent law on this issue, the Court finds that based upon the totality of the circumstances analysis, SBM of Defendant is a reasonable search.

The trial court's order should be italicized, bolded, and highlighted because it is a logical, straight-forward, common sense determination. But, since *Grady I*, our appellate courts have been "moving the goal posts for trial judges and prosecutors at every turn." *State v. Tucker*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 832 S.E.2d 258, 260-61 (2019) (*Berger, J., dissenting*).

*Griffin II* provides the majority with the opportunity to continue to chip away at SBM. The defendant in *Griffin II* pleaded guilty to first-degree sex offense with a child. As set forth previously by this Court, the victim was eleven years old when she disclosed that the defendant "had 'been messing with her for the past three years,' describing penile and digital penetration, as well as penetration with the use of a foreign object. Defendant made a full confession, admitting all of what the victim reported." *State v. Griffin*, 260 N.C. App. 629, 630, 818 S.E.2d 336, 338 (2018). The

defendant served his prison sentence and was on post-release supervision when he was brought back for an SBM determination.

*Griffin II* acknowledged the State's special need to monitor the defendant as a condition of post-release supervision. Despite acknowledging that *Grady III* was not directly on point and these determinations are fact-specific, *Griffin II* reversed the trial court's imposition of SBM by parroting *Grady III's* three-factor analysis. While this should be a fact-specific totality of the circumstances inquiry, our courts have whittled it down to a conclusion that fits every case: SBM is not reasonable.

Our courts could have easily reached opposite results, with far different implications for Defendant. A proper analysis, like that conducted by the trial court, would lead to the conclusion that Defendant has a diminished expectation of privacy. *See Samson v. California*, 547 U.S. 843 (2006); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995). The use of an ankle monitor is a less intrusive means of monitoring Defendant's activity to ensure he is not in or around areas where there are minor children.<sup>6</sup> And, the State has a legitimate governmental interest in protecting children and communities from convicted sex offenders. The State's interests far outweigh Defendant's diminished privacy interests, and SBM is reasonable under the Fourth Amendment.

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<sup>6</sup> The alternative available to the Legislature is longer prison sentences for sex offenders, as the trial court noted. While the Legislature may find this alternative desirable to protect communities from sex offenders given current SBM jurisprudence, an ankle monitor cannot be said to deprive sex offenders of liberty or privacy interests to the same extent as incarceration.

STATE V. WILLIS

*BERGER, J., concurring*