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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-677

Filed: 20 October 2020

Wilson County, No. 17 CRS 52334

STATE OF NORTH CAROLINA

v.

TAFARI BATTLE, Defendant.

Appeal by Defendant from order entered 20 March 2019 by Judge Quentin T. Sumner in Superior Court, Wilson County. Heard in the Court of Appeals 18 February 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Mark Montgomery for Defendant.

McGEE, Chief Judge.

Tafari Battle (“Defendant”) appeals from the order imposing lifetime satellite-based monitoring (“SBM”) upon his release from prison for conviction of first-degree forcible rape. On appeal, Defendant argues that the trial court erred because it did not conduct a *Grady* hearing and the State did not present any evidence that SBM of Defendant was a reasonable search under the Fourth Amendment. Because we hold

that the SBM order is unconstitutional as applied to Defendant, we vacate the order without prejudice to the State's ability to file a subsequent SBM application.

I. Factual and Procedural Background

Ms. C¹ testified that on the morning of 17 July 2017, she woke up after spending the night in her car with her boyfriend, Emunta Carpenter ("Carpenter"). While Ms. C was asleep, Carpenter had used her fingerprint to unlock her cell phone. Carpenter went through Ms. C's phone and upon discovering that she had engaged in sexual relations with other men, began hitting her with his fists and with grip pliers that he found in the car. Carpenter ordered Ms. C to drive to Defendant's house and explained she was "getting flipped," which she understood to mean she "was going to have to have sex . . . with him and another person."

At Defendant's house, Carpenter took Ms. C's car keys, walked inside the house, and returned with Defendant. Carpenter and Defendant got inside Ms. C's car and Carpenter instructed her to drive to his sister's house; Ms. C began "driving recklessly trying to get pulled over."

Carpenter told Defendant to go to the barn behind the house and wait. Carpenter then told Ms. C to walk to the barn as he repeatedly opened and closed the grip pliers "so [she] would go." Carpenter ordered Ms. C to perform fellatio on him and as Defendant watched, "[h]e pulled his penis out and start[ed] stroking it."

¹ To protect her privacy, we refer to the complainant as "Ms. C." *See State v. Gordon*, 248 N.C. App. 403, 404, 789 S.E.2d 659, 661, fn1 (2016).

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Carpenter ordered Ms. C to stand and turn around. When she refused, Defendant watched Carpenter punch her “[a] lot.” Carpenter forced Ms. C to perform oral sex on him again and, when she refused, Carpenter beat her. Finally, Ms. C slowly stood up, looked at Defendant and begged, “please don’t do it[,]” and pleaded with Carpenter, “please don’t let him do it.”

Carpenter and Defendant bent Ms. C over a sofa, and Defendant penetrated her vagina with his penis three times. Carpenter again forced Ms. C perform oral sex on him. When she “didn’t do it right like [she] was supposed to[,]” he hit her and told Defendant to step out.

Carpenter beat Ms. C with his fists and the grip pliers. When Defendant returned, Carpenter was still beating and kicking her. Ms. C saw that her keys were on the ground and she “crawled to them[.]” Ms. C picked up her key ring and Defendant grabbed her hair. Realizing that “it was either [her] hair or [her] life[,]” Ms. C “ripped [her] hair out of [her] head,” ran to her car, and drove away. Defendant did not present evidence.

Defendant was tried and convicted by a jury of first-degree forcible rape in Superior Court, Wilson County on 20 March 2019. The trial court sentenced Defendant to a minimum term of 240 months and a maximum term of 348 months imprisonment. After announcing Defendant’s sentence in open court, the following exchange occurred:

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THE COURT: I'm sorry. One other thing. I'm sorry. You[re] required, sir, to register as required by law as a sex offender, sir. And, [the State], in terms of the satellite based monitoring.

[THE STATE]: Yes, sir. We'll get a form printed. It's going to be an aggravated offense.

THE COURT: Aggravated offense.

[THE STATE]: So it will be lifetime, it will be monitoring lifetime registration.

THE COURT: All right. [Defendant], you have lifetime registration as a sex offender and you're also [sic] lifetime monitoring by satellite GPS monitoring also.

THE DEFENDANT: Yes, sir. Be blessed, sir.

The trial court entered its judgment and SBM order on 20 March 2019. The SBM order provided “upon release from imprisonment, the defendant shall enroll in satellite-based monitoring.” Defendant filed a written notice of appeal from the SBM order on 4 April 2019.

II. Analysis

A. Lifetime SBM

Defendant argues on appeal that the trial court erred by imposing lifetime SBM when the State did not offer any evidence that SBM was reasonable under the Fourth Amendment in this case. However, the transcript of the sentencing hearing shows that Defendant did not argue during sentencing that the imposition of lifetime SBM constituted an unreasonable search under the Fourth Amendment. Pursuant to Rule 10 of our Appellate Rules of Procedure, “to preserve an issue for appellate

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review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1). Accordingly, because Defendant did not object to the imposition of lifetime SBM on constitutional grounds, he has waived the ability to argue it on appeal. *State v. Bursell* (“*Bursell II*”), 372 N.C. 196, 200, 827 S.E.2d 302, 305 (2019).

Defendant requests that “[s]hould this Court deem the issue somehow unpreserved, it should address the merits by invoking Rule 2 and suspending Rule 10’s preservation requirements ‘to prevent manifest injustice.’” Under Rule 2 of our Rules of Appellate Procedure, “[t]o prevent manifest injustice to a party[] . . . either court of the appellate division may[] . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . upon its own initiative[.]” N.C. R. App. P. 2. An appellate court’s decision to invoke Rule 2 and suspend the appellate rules is always an exercise of discretion. *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306.

“Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*.” *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis in original) (citation omitted). The determination of whether a particular case is an

“instance” appropriate for Rule 2 review “must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether ‘substantial rights of an appellant are affected.’” *Id.* (emphasis in original) (quoting *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007)).

In two recent cases, *State v. Ricks*, ___ N.C. App. ___, 843 S.E.2d 652, *writ allowed*, ___ N.C. ___, 842 S.E.2d 88 (2020) and *State v. Graham*, ___ N.C. App. ___, 841 S.E.2d 754, *writ allowed*, ___ N.C. ___, 845 S.E.2d 788 (2020), *and review allowed in part, denied in part*, ___ N.C. ___, 845 S.E.2d 789 (2020),² this Court invoked Rule 2 and suspended Rule 10(a)(1) to review appeals from SBM orders entered without a *Grady* hearing and without the State presenting any evidence of reasonableness. Also, although we recognize that “precedent cannot create an automatic right to review via Rule 2[.]” *Campbell*, 369 N.C. at 603, 799 S.E.2d at 603, we consider these cases informative in our exercise of discretion.

Just as we look to *Ricks* and *Graham* for instruction, *Ricks* sought guidance from our Supreme Court’s decision in *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306 (affirming this Court’s invocation of Rule 2 to suspend Rule 10(a)(1) and review an appeal from an SBM order in *State v. Bursell* (“*Bursell I*”), 258 N.C. App. 527, 813 S.E.2d 463 (2017), *aff’d in part, rev’d in part*, 372 N.C. 196, 827 S.E.2d 302 (2019)).

² We note that *Ricks* and *Graham* have been stayed by our Supreme Court and are of questionable precedential value as a result. However, because the invocation of Rule 2 is a discretionary decision, we nonetheless find their reasoning persuasive.

Ricks identified several factors that this Court considered in *Bursell I* when it exercised its discretion and invoked Rule 2 including, “whether the case involved a substantial right” and “the State’s and the trial court’s failures to follow well-established precedent in applying for and imposing SBM[.]” *Ricks*, ___ N.C. App. at ___, 843 S.E.2d at 662–63. We too consider these factors “instructive in our exercise of discretion here.” *Id.* at ___, 843 S.E.2d at 662.

First, in light of the United States Supreme Court’s holding that the imposition of SBM effects a continuous warrantless search, *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L.Ed.2d 459, 462-63 (2015), this Court has held the Fourth Amendment right implicated by the imposition of SBM “is a substantial right that warrants our discretionary invocation of Rule 2” in *Graham*, ___ N.C. App. at ___, 841 S.E.2d at 769. Moreover, in the present case, as in *Ricks*,

the State and the trial court . . . had the benefit of even more guidance regarding the State’s burden than in *Bursell*. Indeed, *State v. Greene*, 255 N.C. App. 780, 806 S.E.2d 343 (2017), *State v. Grady* (“*Grady II*”), 259 N.C. App. 664, 817 S.E.2d 18 (2018), *aff’d as modified*, 372 N.C. 509, 831 S.E.2d 542 (2019) (“*Grady III*”), *State v. Griffin*, 260 N.C. App. 629, 818 S.E.2d 336 (2018), and *State v. Gordon* (“*Gordon I*”), 261 N.C. App. 247, 820 S.E.2d 339 (2018), all were published prior to Defendant’s sentencing hearing. *These cases make clear that the trial court must conduct a hearing to determine the constitutionality of ordering a defendant to enroll in the SBM program, and that the State bears the burden of proving the reasonableness of the search.*

Ricks, ___ N.C. App. at ___, 843 S.E.2d at 663 (emphasis added). The multiple cases referenced above clearly state a *Grady* hearing must be conducted and the State must present any evidence regarding the reasonableness of the search. For these specific reasons, we exercise our discretion and invoke Rule 2 to reach the merits of Defendant's appeal.

B. Merits

In this case, at the time of Defendant's sentencing hearing, Defendant was ordered to submit to SBM solely due to his conviction of an aggravated offense; however, he will not actually enroll in the program until after he has completed his multi-year active prison sentence. In North Carolina, it is well-established that a trial court *must* conduct a *Grady* hearing before imposing lifetime SBM. *State v. Gordon* ("Gordon II"), ___ N.C. App. ___, ___, 840 S.E.2d 907, 909 (2020) ("After determining that an individual meets the criteria for one of three categories of offenders subject to the satellite-based monitoring program, *see* [N.C. Gen. Stat.] § 14-208.40(a)(1)-(3), the trial court must conduct a hearing in order to determine the constitutionality of ordering the targeted individual to enroll in the satellite-based monitoring program" (citations omitted)). At the hearing, "the State must prove that the SBM program is reasonable as applied to the defendant, considering the totality of the circumstances, the nature and extent to which it intrudes upon the defendant's reasonable privacy interests, and the extent to which it furthers legitimate

governmental interests.” *Graham*, ___ N.C. App. at ___, 841 S.E.2d at 770 (citation omitted).

“The trial court must weigh the State’s ‘interest in solving crimes that have been committed, preventing the commission of sex crimes, and protecting the public,’ *Grady III*, 372 N.C. at 545, 831 S.E.2d at 568, against SBM’s ‘deep . . . intrusion upon an individual’s protected Fourth Amendment interests,’ *id.* at 538, 831 S.E.2d at 564.” *Ricks*, ___ N.C. App. at ___, 843 S.E.2d at 664. And, if the trial court imposes a *future term of SBM* to follow a defendant’s active sentence, as the trial court did in this case, “the State also must ‘demonstrate what a defendant’s threat of reoffending will be after having been incarcerated for’ the duration of his sentence with some ‘individualized measure of the defendant’s threat of reoffending.’” *Id.* (quoting *Gordon II*, 2020 WL 1263993, at *6) (brackets omitted).

In the present case, at the close of the sentencing hearing, the trial court asked the State about the “terms of the satellite based monitoring.” The State told the court it would submit the appropriate form and indicated that Defendant’s offense was an aggravated offense that required lifetime monitoring. The trial court then ordered Defendant to enroll in lifetime SBM upon his release from prison. *See* N.C. Gen. Stat. § 14-208.40A(c) (2019) (“If the court finds that the offender . . . has committed an aggravated offense, . . . the court shall order the offender to enroll in a satellite-based monitoring program for life.”). However, as in *Ricks*,

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the above was the entirety of the trial court's SBM consideration. The State presented no evidence or testimony at the sentencing hearing regarding the reasonableness of the search entailed by SBM in general or in this instance. And the trial court made no findings regarding the reasonableness of the search, let alone its reasonableness when Defendant is released Such consideration is constitutionally obligatory.

Ricks, ___ N.C. App. at ___, 843 S.E.2d at 665 (citation omitted).

As a result, we hold that the SBM order is unconstitutional as applied to Defendant and, as a result, we vacate the order without prejudice to the State's ability to file a subsequent SBM application. *See id.*, ___ N.C. App. at ___, 843 S.E.2d at 665 (citing *Bursell I* and *Bursell II* and holding that "the trial court order imposing SBM pursuant to N.C. Gen. Stat. § 14-208.40(a) is unconstitutional as applied to [the] defendant and must be vacated"); *Bursell I*, 258 N.C. App. at 534, 813 S.E.2d at 468 ("Because no *Grady* hearing was held before the trial court imposed SBM, we vacate its order without prejudice to the State's ability to file a subsequent SBM application."); *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306 (affirming this Court's decision in *Bursell I* to vacate the trial court's SBM order without prejudice).

III. Conclusion

For the reasons discussed above, because the trial court ordered Defendant to enroll in lifetime SBM without holding a *Grady* hearing and without the State offering any evidence proving the search of Defendant was reasonable under the

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Fourth Amendment, we vacate the SBM order without prejudice to the State's ability to file another SBM application.

VACATED.

Judges BRYANT and HAMPSON concur.

Report per Rule 30(e).