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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-436

No. COA20-693-2

Filed 21 June 2022

Durham County, No. 15 CRS 59450

STATE OF NORTH CAROLINA

v.

D'MONTE LAMONT O'KELLY

Appeal by Defendant from order entered 15 June 2017 by Judge Rebecca Holt in Durham County Superior Court. Originally heard in the Court of Appeals 8 June 2021, with unpublished opinion issued 3 August 2021. On 14 December 2021, the Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding this case to this Court to reconsider its holding in light of the Supreme Court's decisions in *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, and *State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, as well as the General Assembly's amendments to the satellite-based monitoring program, *see* Act of Sep. 2, 2021, S.L. 2021-138, § 18, <https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf> (effective 1 December 2021).

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele Goldman, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant D'Monte Lamont O'Kelly timely appealed the trial court's order requiring him to submit to satellite-based monitoring ("SBM") for life following his eventual release from prison. The Court of Appeals held that the State failed to establish that Defendant's submission to lifetime SBM constitutes a reasonable Fourth Amendment search, and it reversed the trial court's order in an unpublished opinion issued 3 August 2021. *See State v. O'Kelly*, 2021-NCCOA-420.

¶ 2 On 7 September 2021, the State filed a petition for discretionary review with the North Carolina Supreme Court. On 14 December 2021, the Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding the case to this Court to reconsider its holding in light of the Supreme Court's decisions in *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, and *State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, as well as the General Assembly's amendments to the satellite-based monitoring program, *see* Act of Sep. 2, 2021, S.L. 2021-138, § 18, <https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2021-2022/SL2021-138.pdf> (effective 1 December 2021).

I. Background

¶ 3 On 30 May 2017, Defendant entered a plea of guilty to, *inter alia*, first-degree rape, an "aggravated offense" as defined in N.C. Gen. Stat. § 14-208.6(1a). His

convictions were consolidated into one judgment, and Defendant was sentenced to an active sentence of 192 to 291 months' imprisonment and ordered to register as a sex-offender for his lifetime.

¶ 4 After a hearing on the State's petition for SBM and Defendant's motion to dismiss the petition, the trial court ordered Defendant to enroll in SBM for the remainder of his natural life following his release from prison, unless monitoring is terminated pursuant to N.C. Gen. Stat. § 14-208.43. Defendant timely noticed appeal.

II. Analysis

¶ 5 In *Hilton* and *Strudwick*, our Supreme Court addressed the constitutionality of the imposition of lifetime SBM following a defendant's conviction for an aggravated offense as defined in N.C. Gen. Stat. § 14-208.6(1a). In both cases, our Supreme Court examined the totality of the circumstances in conducting the requisite Fourth Amendment balancing test to determine the reasonableness of the search imposed by SBM.

¶ 6 The Court concluded that the State has a manifest legitimate interest in protecting the public from certain sex offenders after release from incarceration, and that the efficacy of the SBM program is clear, in that it furthers the legislative purpose of the program by assisting law enforcement agencies in solving crimes and deterring recidivism. *See Hilton*, 378 N.C. at 704-709, 2021-NCSC-115, at ¶¶ 21-22,

25, 27-28; accord *Strudwick*, 379 N.C. at 114, 2021-NCSC-127, at ¶ 26 (acknowledging that SBM aids “in solving crimes and facilitating apprehension of suspects so as to protect the public from sex offenders”) (citations omitted).

¶ 7 Additionally, the Court determined that the State’s interest in SBM outweighs an aggravated offender’s diminished expectation of privacy. *Hilton*, 378 N.C. at 711, 2021-NCSC-115, at ¶ 35 (“Given the totality of the circumstances, SBM’s collection of information regarding physical location and movements effects only an incremental intrusion into an aggravated offender’s diminished expectation of privacy.”); *Strudwick*, 379 N.C. at 114, 2021-NCSC-127, at ¶ 25 (“[T]he imposition of lifetime SBM on [a] defendant constitutes a pervasive but tempered intrusion upon his Fourth Amendment interests.”) (citation omitted).

¶ 8 Our Supreme Court concluded, in light of these determinations, that the imposition of lifetime SBM on a convicted sex offender in the aggravated offender category is a reasonable search under the Fourth Amendment. *Hilton*, 378 N.C. at 699, 2021-NCSC-115, at ¶ 12; *Strudwick*, 379 N.C. at 115, 2021-NCSC-127, at ¶ 28 (“When utilized for the stated purpose, the lifetime SBM program is constitutional due to its promotion of the legitimate and compelling governmental interest which outweighs its narrow, tailored intrusion into [a] defendant’s expectation of privacy in his person, home, vehicle, and location.”).

¶ 9 In *O’Kelly*, we considered the totality of the circumstances to determine

“whether the warrantless, suspicionless search [wa]s reasonable when ‘its intrusion on the individual’s Fourth Amendment interests’ is balanced ‘against its promotion of legitimate governmental interests.’” 2021-NCCOA-420, ¶ 14 (quoting *State v. Grady*, 372 N.C. 509, 527, 831 S.E.2d 542, 557 (2019)). We concluded that the State failed to present any evidence demonstrating that SBM advances these legitimate interests and that the lack of evidence presented by the State weighs against a finding of reasonableness. *Id.* at ¶¶ 23, 24. We ultimately concluded:

After considering the totality of the circumstances, the imposition of lifetime SBM substantially infringes upon Defendant’s appreciable privacy interests and the State failed to meet its burden of demonstrating the reasonableness of this search.

Id. at ¶ 25.

¶ 10 However, our Supreme Court held that its recognition of the State’s legitimate interest in and the efficacy of SBM obviates the need for the State to provide such proof on an individualized basis. *Hilton*, 378 N.C. at 707-08, 2021-NCSC-115, at ¶ 28 (“Since we have recognized the efficacy of SBM in assisting with the apprehension of offenders and in deterring recidivism, there is no need for the State to prove SBM’s efficacy on an individualized basis.”); see also *Strudwick*, 379 N.C. at 112-13, 2021-NCSC-127, at ¶ 23 (concluding that the purposes of the SBM program “are universally recognized as legitimate and compelling”) (citations omitted).

¶ 11 Furthermore, our Supreme Court concluded that SBM presents a minimal,

limited intrusion into a defendant's privacy. *Hilton*, 378 N.C. at 710, 2021-NCSC-115, at ¶ 32 (concluding that the "physical limitations [of SBM] are more inconvenient than intrusive and do not materially invade an aggravated offender's diminished privacy expectations"); accord *Strudwick*, 379 N.C. at 115, 2021-NCSC-127, at ¶ 28 (concluding that lifetime SBM is a "narrow, tailored intrusion into [a] defendant's expectation of privacy"). The Court explained in *Hilton* that the privacy interests of an aggravated offender "remain impaired for the remainder of his life due to his status as a convicted aggravated sex offender[.]" 378 N.C. at 708-09, 2021-NCSC-115, at ¶ 30, and "the imposition of lifetime SBM causes only a limited intrusion into that diminished privacy expectation." *Id.* at 712, 2021-NCSC-115, at ¶ 36.

¶ 12 Based on our review of the totality of the circumstances in this case, and in light of the Supreme Court's decisions in *Hilton* and *Strudwick*, as well as the General Assembly's amendments to the SBM program, *see* Act of Sep. 2, 2021, S.L. 2021-138, § 18, we hold that the imposition of lifetime SBM following Defendant's conviction for an aggravated offense does not constitute an unreasonable search under the Fourth Amendment.

¶ 13 Defendant also argues that the imposition of SBM constitutes a general warrant, in violation of our North Carolina Constitution. Following *Hilton*, we reject this argument as "[o]rders imposing SBM pursuant to the program . . . do not constitute general warrants." *Hilton*, 378 N.C. at 714-15, 2021-NCSC-115, at ¶ 41.

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Opinion of the Court

¶ 14 We affirm the trial court's order imposing lifetime SBM following Defendant's release from incarceration.

AFFIRMED.

Chief Judge STROUD and Judge WOOD concur.

Report per Rule 30(e).