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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-325

Filed 5 November 2024

Forsyth County, No. 23 CRS 224723

STATE OF NORTH CAROLINA

v.

TERRANCE HAYES, Defendant.

Appeal by Defendant from judgment entered 19 July 2023 by Judge Michael D. Duncan in Forsyth County Superior Court. Heard in the Court of Appeals 8 October 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Colin Justice, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for defendant-appellant.

MURPHY, Judge.

We have previously held, in *State v. Gardner*, that data obtained from the continuous satellite-based monitoring of a sex offender is not testimonial hearsay for Confrontation Clause purposes because it was obtained to ensure compliance with post-release supervision and not primarily to prove a fact at trial. As in *Gardner*, this case presents data collected by an electronic monitoring system for convicts on post-

release supervision, the transmission of which occurred at discrete points in time in response to salient inputs. Given these similarities, our analysis in *Gardner* is binding as to this case, and we hold that the admission of the evidence in question was not erroneous.

BACKGROUND

On 9 January 2023, Defendant was released from prison and placed in post-release supervision. As a condition of post-release supervision, Defendant was required to submit to electronic monitoring via a monitor on his ankle and observe a curfew. On 27 January 2023, Defendant was alleged to have interfered with his electronic monitoring in violation of N.C.G.S. § 14-226.3(b),¹ resulting in his indictment on 10 April 2023 and trial beginning on 17 July 2023.

During trial, the State moved to admit an activity log generated and maintained by BI Monitoring, a third-party business, based on activity transmitted from Defendant's ankle monitor. Defendant objected on Confrontation Clause grounds. The State indicated that Defendant's monitor would transmit data to BI when he entered "exclusion zones"²; when the battery was running low or filled; when

¹ N.C.G.S. § 14-226.3(b) provides, in relevant part, that "[i]t is unlawful for any person to knowingly and without authority remove, destroy, or circumvent the operation of an electronic monitoring device that is being used for the purpose of monitoring a person who is[] . . . [w]earing an electronic monitoring device as a condition of post-release supervision." N.C.G.S. § 14-226.3(b)(5) (2023).

² "Exclusion zones" are areas Defendant is prohibited from entering as a condition of post-release supervision, while "inclusion zones" are zones in which the ankle monitor stops tracking Defendant altogether.

the device was seeking Defendant's location; when authorities would attempt to contact Defendant; when the device was deactivated; when Defendant broke curfew; when a battery was placed into the device; when the device was unplugged; or when the ankle strap affixing the device to Defendant was tampered with. The device would also indicate when he was in proximity to a "Beacon" device in his home. The trial court overruled the objection, ruling that the evidence was not testimonial.

Defendant was ultimately convicted, and he now appeals.

ANALYSIS

On appeal, Defendant argues only that the trial court erred in overruling his Confrontation Clause objection. Specifically, he argues that this case is distinguishable from our holding in *State v. Gardner*, in which we held that GPS reports from a satellite-based ankle monitor did not violate a defendant's Sixth Amendment right to confrontation. *See generally State v. Gardner*, 237 N.C. App. 496 (2014). "We review defendant's Confrontation Clause challenge *de novo*." *Id.* at 499 (citing *State v. Ortiz-Zape*, 367 N.C. 1, 9-10 (2013)).

Our Supreme Court's most recent doctrinal summary concerning the Confrontation Clause of the Sixth Amendment was in *State v. Pabon*:

The Sixth Amendment to the United States Constitution establishes that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend VI. This "bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (citing *Pointer v. Texas*, 380 U.S. 400, 406 (1965)).

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Although the basic theory of the right to confront one's accusers "dates back to Roman times[.]" our country's "immediate source of the concept . . . was the [English] common law.["] *Crawford*, 541 U.S. at 43.

Modern times and technologies introduced a new question to this old right: who does the accused have the right to confront when the "accuser" is not a person, but a forensic report? In 2011, the Supreme Court of the United States answered this question in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). There, the principal evidence presented against defendant Donald Bullcoming in his trial for driving while intoxicated was "a forensic laboratory report certifying that [his] blood-alcohol concentration was well above the [legal] threshold." *Id.* at 651. "At trial, the prosecution did not call as a witness the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample." *Id.* The Court held that this did not satisfy Bullcoming's rights under the Confrontation Clause because the testifying analyst provided mere "surrogate testimony" without expressing any "'independent opinion' concerning Bullcoming's BAC."

Since *Bullcoming*, this Court has sought to apply this constitutional protection with fidelity. In *Ortiz-Zape*, for instance, because a forensic scientist "testified as to her opinion that a substance was cocaine based upon her independent analysis of testing performed by another analyst in her laboratory[.]" this Court held that "the testifying expert was the witness whom defendant had the right to confront." 367 N.C. 1[] at 2. Accordingly, we reversed the Court of Appeals' holding that the expert's testimony violated the Confrontation Clause. *Id.* at 14.

In *State v. Craven*, 367 N.C. 51 (2013), this Court reached the opposite conclusion on the same question where a forensic chemist who had not personally performed the testing of the alleged cocaine "testified about the identity, composition, and weight of the substances recovered" from

the defendant. *Id.* at 54. However, based on a review of the testimony, this Court determined that the testifying witness “did not offer—or even purport to offer—her own independent analysis or opinion on the . . . samples. Instead, [she] merely parroted [the nontestifying analysts’] conclusions from their lab reports.” *Id.* at 56-57. Accordingly, this Court held that the testifying expert’s “surrogate testimony violated defendant’s Sixth Amendment right to confrontation.” *Id.* at 5.

When a Confrontation Clause violation is established, the reviewing court must then “determine if the admission of [the offending] evidence . . . was such prejudicial error as to require a new trial.” *State v. Watson*, 281 N.C. 221, 232 (1972). “A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt.” N.C.G.S. § 15A-1443(b). “The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.” N.C.G.S. § 15A-1443(b). If it does so, the jury’s verdict is not disturbed on appeal, in spite of a Confrontation Clause violation. *See Watson*, 281 N.C. at 233 (determining that a Confrontation Clause error was harmless beyond a reasonable doubt).

State v. Pabon, 380 N.C. 241, 252-54 (2022). Thus, “surrogate testimony” like that discussed in *Pabon* requires the opportunity for the defendant to confront the witness. *Id.* at 253.

However, under *Crawford v. Washington*, the evidence still must be testimonial for the Confrontation Clause to apply. *Crawford*, 541 U.S. at 51-52. Testimonial evidence consists of “statements that declarants would reasonably expect to be used prosecutorially”; or, put differently, “statements that were made under

circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]” *Id.*

In *Gardner*, we evaluated whether GPS tracking reports from an ankle monitor were testimonial for purposes of the Confrontation Clause as it related to a defendant who had been convicted for failing to register as a sex offender and sex offender registration violation. *Gardner*, 237 N.C. App. at 497. In that case, Defendant was a sex offender required to submit to satellite-based monitoring, and the ankle monitor “used GPS and cell phone towers to pinpoint the location of an offender in real time.” *Id.* at 498. A database tracked whether Defendant entered or exited an exclusion or inclusion zone, and it kept a log of activities. *Id.* Under those facts, we held that the Confrontation Clause was inapplicable because the reports were nontestimonial, tracking the defendant for purposes of ensuring compliance with post-release supervision and not primarily to prove a fact at a criminal trial:

On appeal, defendant contends that the GPS data and report offered into evidence at trial was generated solely “for the purposes of criminal prosecution.” Therefore, he argues that the GPS evidence was testimonial in nature and subject to the Confrontation Clause.

As in *Brooks*, the GPS evidence admitted in this case was not generated purely for the purpose of establishing some fact at trial. Instead, it was generated to monitor defendant’s compliance with his post-release supervision conditions. The GPS evidence was only pertinent at trial because defendant was alleged to have violated his post-release conditions. We hold that the GPS report was non-testimonial and its admission did not violate defendant’s Confrontation Clause rights.

Id. at 500 (citing *United States v. Brooks*, 715 F.3d 1069 (8th Cir. 2013)).

Here, Defendant challenges the applicability of *Gardner*, attempting to distinguish his case on two bases. First, he argues that the purpose of the monitoring of the defendant in *Gardner* was different than his monitoring because the monitoring of a sex offender is intended to protect the public, not just ensure compliance with post-release conditions. Second, he argues he was not subject to continuous monitoring because the data offered at his trial consisted of snapshots in time intended to prove his noncompliance with supervision requirements at a subsequent trial. For these reasons, he contends the monitoring data used against him was testimonial, even though the data in *Gardner* was not.

We disagree. While *Gardner* did indeed concern a defendant who was monitored as a sex offender, our analysis did not depend on the supervision's role for public protection; rather, it depended on the supervision's role in "monitor[ing] defendant's compliance with his post-release supervision conditions." *Id.* Although Defendant's arguments could have been persuasive if the issue were of first impression, the binding reasoning of *Gardner* invalidates the distinction proffered by Defendant. As held in *Gardner*, tracking data is not primarily used for purpose of prosecution—and is therefore nontestimonial—when it is used for monitoring purposes. The data here was, as in *Gardner*, used for tracking purposes; there is,

therefore, no distinction to be applied between the legal analysis here and that in *Gardner*.

Furthermore, as to Defendant's purported distinction between the data collection in *Gardner* and the data collection here, the difference is overstated. While it is true that the satellite-based system in *Gardner* operated continuously and in real time, the data introduced at trial was, as here, a collection of discrete snapshots in time presented as an activity log. *Id.* at 497-98. Both also specifically created data points during instances when the wearer of the ankle monitor violated the terms of supervision. *Id.* at 498. Finally, we note that it is unclear whether the technologies that captured the activity log or monitored the defendants were actually different in the two cases, as we have nothing in the record to suggest Defendant was monitored on anything less than a continuous basis.³ We also, therefore, cannot draw a factual distinction between this case and *Gardner*.

Given the lack of distinction between the two cases, *Gardner* applies in full force here, and we must hold that no Confrontation Clause violation occurred at Defendant's trial.

CONCLUSION

The admission of tracking data from Defendant's ankle monitor at trial did not violate the Confrontation clause, as the data was not testimonial.

³ Indeed, reference in the record to "inclusion zones" in which monitoring would specifically *cease* implies that Defendant's monitoring was otherwise continuous.

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NO ERROR.

Judges GRIFFIN and THOMPSON concur.

Report per Rule 30(e).