STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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AUG 19 2016
SC Court of Appeals

Appeal from Greenville County
The Honorable Steven H. John, Circuit Court Judge

Appellate Case No. 2016-000953

THE STATE,..RESPONDENT

v.

DEVAROUS S.L. PARKS,..APPELLANT

INITIAL BRIEF OF RESPONDENT

Matthew Buchanan
General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250

ATTORNEY FOR RESPONDENT

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CASES

Grady v. North Carolina, 135 S.Ct. 1368 (2015)..1-3
Florida v. Jimeno, 500 U.S. 248, 250 (1991)..3
North Carolina v. Alford, 400 U.S. 25 (1970)..1
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STATUTES

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S.C. Code Ann. §23-3-540(Supp. 2015)..*passim*

STATEMENT OF ISSUES ON APPEAL

Whether the court erred by ordering GPS monitoring of the appellant under the mandatory provisions of S.C. Code 23-3-540(A) when the South Carolina Supreme Court has determined that mandatory GPS monitoring is a reasonable search under the Fourth Amendment?

STATEMENT OF THE CASE

On April 14, 2015, the appellant pled under North Carolina v. Alford, 400 U.S. 25 (1970) to Lewd Act upon a Minor, for which he received a sentence of six years incarceration suspended on thirty months probation. At the time of the plea, the court did not address the mandatory satellite monitoring program, although it did reference the sex offender registry. Tr. 3, ll. 1-12.

A subsequent hearing occurred the following day on April 15, 2015 before the Honorable Steven H. John regarding S.C. Code §23-3-540(A). The State argued that the statute required the court to order the South Carolina Department of Probation, Parole and Pardon Services (the Department) to monitor the appellant with an active electronic monitoring device. Furthermore, the State argued that no hearing was necessary given the language of the statute. Tr. 4, ll. 6-10.

The appellant argued that the U.S. Supreme Court decision in Grady v. North Carolina, 135 S.Ct. 1368 (2015), now required an individualized assessment of the electronic monitoring because of its holding that satellite monitoring constituted a search. Tr. 6, l. 21 – Tr. 8, ll. 2.

The trial court ruled against the appellant, requiring him to be electronically monitored by the Department. In its ruling, the court found that South Carolina's monitoring program has a reasonable and rational basis, in light of the appellant's Fourth Amendment challenge to the statute.

ARGUMENT

The court did not err by ordering GPS monitoring of the appellant, as it is mandatory under the statute and that Grady v. North Carolina, 135 S.Ct. 1368 (2015) does not require an individualized finding of reasonableness.

The appellant argues throughout his appeal that the holding in the U.S. Supreme Court case Grady v. North Carolina, 135 S.Ct. 1368 (2015) requires an individualized on-the-record showing

and finding that the satellite monitoring is reasonable based upon the appellant's likelihood to reoffend. This is not supported in the language of the opinion, and a clear understanding of the issues in Grady will reveal that the Supreme Court did not make such a ruling.

Torrey Dale Grady was convicted in North Carolina of two separate sex offenses, one in 1997 and another in 2006. The subsequent offense defined him as a recidivist sex offender, which required lifetime satellite monitoring. N.C. Gen.Stat. §14-208.40B. North Carolina law requires a hearing before a trial court judge for a determination if the offender falls within one of the categories that require lifetime satellite monitoring. Although Grady did not dispute that he was a recidivist offender, he objected to the satellite monitoring on the basis that it violated his Fourth Amendment right to be free from unreasonable search and seizures. The trial court ordered the monitoring over his objection. Grady at 1369.

The North Carolina Court of Appeals confirmed the trial court's holding and rejected the Fourth Amendment challenge. In its conclusion, the Court of Appeals indicated that the satellite monitoring program did not constitute a search within the meaning of the Fourth Amendment. Grady at 1370. The North Carolina Supreme Court dismissed Grady's appeal.

The Supreme Court in a *per curiam* decision remanded the case, stating that satellite monitoring was a search within the meaning of the Fourth Amendment. This finding did not invalidate the statute, as the Court stated the Fourth Amendment only prohibits unreasonable searches. In its remand, the Court emphasized that it made no determination of the constitutionality of North Carolina's statute. Furthermore, the Court did not state that the lower court must make an individualized finding of reasonableness.

Lastly, the Seventh Circuit Court of Appeals did not read into Grady this sort of expansive reading. "[A]lthough the Supreme Court has read into the amendment a qualified protection

against invasions of privacy, its recent decision in *Grady v. North Carolina* indicates that electronic monitoring of sex offenders is permitted if reasonable." Belleau v. Wall, 811 F.3d 929, 932 (7th Cir. 2016)(citation omitted).

In the case at bar, the appellant challenges South Carolina Code §23-3-540(A), which requires mandatory satellite monitoring for all offenders convicted of Criminal Sexual Conduct with a Minor in the first degree and also in the third degree (formerly Lewd Act on a Minor). The appellant asks this Court to overlook the South Carolina Supreme Court's holding in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) that South Carolina's satellite monitoring program is reasonable under the Fourth Amendment. Id. at fn 9 (citing Florida v. Jimeno, 500 U.S. 248, 250 (1991)("The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.").

As noted earlier, the appellant relies on an overreaching interpretation of the Supreme Court's holding in Grady. He states in his brief that the holding "meant that the court obviously had to access the individual circumstances of the particular case and person before the Court." App. Br. p. 5. This is not supported in the opinion. Instead, the Supreme Court remanded so the North Carolina courts could "examine whether the State's monitoring program is reasonable – when properly viewed as a search" because it refused to do so. Id. at 1371. The Court made no mention of an examination of the individualized circumstances of Grady. The Court remanded for a Fourth Amendment analysis of North Carolina's monitoring *program.*

For this reason, South Carolina's holding in Dykes is not affected by Grady. The South Carolina Supreme Court has already reviewed this state's monitoring statute in the context of the Fourth Amendment. Unlike the North Carolina Court of Appeals, which held it wasn't a search at all, the South Carolina Supreme Court held that it was reasonable. See Dykes, fn 9.

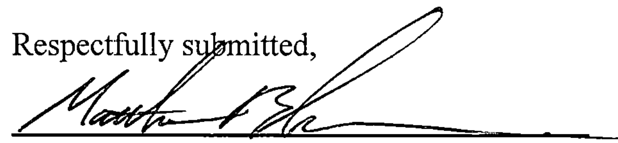
It should furthermore be noted that North Carolina's lifetime satellite monitoring program appears to truly be for life. South Carolina's program now allows for judicial review after 10 years after the corrective measure found in Dykes.

Therefore, the trial court in this case did not need to state why he required the appellant to be electronically monitored. It was sufficient that the court follow the mandates of §23-3-540(A).

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the order requiring electronic monitoring of the appellant be upheld.

Respectfully submitted,



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Attorney for the Respondent

Columbia, South Carolina
August 17, 2016

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THE STATE,..RESPONDENT

v.

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CERTIFICATE OF SERVICE

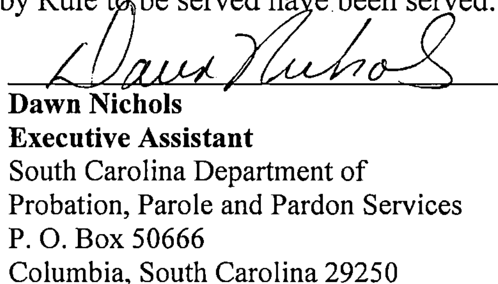
I, Dawn Nichols, Executive Assistant, hereby certify that this 18th day of August, 2016, I served the following documents:

1. Initial Brief of Respondent and Designation of Matter; and
2. Certificate of Service.

by first class mail, postage prepaid as follows:

Robert Dudek, Chief Appellate Defender
S.C. Commission on Indigent Defense
P.O. Box 11589
Columbia, S.C. 29211-1589

I further certify that all parties required by Rule to be served have been served.



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State of South Carolina
Department of Probation, Parole and Pardon Services

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August 18, 2016

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street- 5th Floor
Columbia, South Carolina 29201

RE: **The State v. Devarous Parks**

Dear Ms. Kitchings:

Please find enclosed the original and one of copy of Respondent's Initial Brief and Designation of Matter along with a certificate of Service in the above captioned case.

Thank you for your assistance in this matter.

Sincerely,

Matthew C. Buchanan
General Counsel

MCB:dn
Enclosures

cc: Robert Dudek, Chief Appellate Defender

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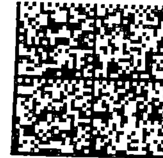

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