ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEVAROUS S.L. PARKS,

APPELLANT

APPELLATE CASE NO. 2015-000953

FINAL BRIEF OF APPELLANT

Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by ordering GPS monitoring of appellant under the mandatory provisions of the statute, without an individualized on-the-record showing and finding that it was reasonable under the Fourth Amendment and Grady v. North Carolina, 135 S.Ct. 1368 (2015) for appellant to be constantly monitored for the protection of the public?

STATEMENT OF THE CASE

Appellant entered an Alford[1] plea to the charge of lewd act upon a minor, now criminal sexual conduct with a minor in the third degree. He was sentenced to six years imprisonment, suspended on thirty months probation. R. 26, ll. 1-12. As a result of the Alford plea appellant was required to register as a sex offender and he was placed on the "central registry of child abuse and neglect pursuant to the mandatory terms of 17-25-133." R. 26, ll. 1-12.

A hearing was convened on April 15, 2015 before the Honorable Steven H. John on the issue of whether appellant was also subject to electronic monitoring which the state alleged was mandatory under S.C. Code §23-3-540. The state, assistant solicitor L. Mark Moyer, argued appellant was not even entitled to a hearing on the subject because electronic monitoring was mandatory under the statute.

Chris Scalzo represented appellant, and he argued an individualized assessment of the reasonableness of the search -- the electronic monitoring --- had to be made pursuant to the Fourth Amendment, and Grady v. North Carolina, 135 S.Ct. 1368 (2015) which was decided subsequent to State v. Dykes, 403 S.C. 499, 744 S.E.2dd 505 (2013). R. 27, l. 6 - 39, l. 25..

At the conclusion of the truncated hearing, Judge John ruled that appellant had to be subjected to continuing electronic monitoring. R. 33, l. 21 – 37, l. 15. This appeal follows.

---

[1] North Carolina v. Alford, 400 U.S. 25 (1970).

ARGUMENT

The court erred by ordering GPS monitoring of appellant under the mandatory provisions of the statute, without an individualized on-the-record showing and finding that it was reasonable under the Fourth Amendment and *Grady v. North Carolina*, 135 S.Ct. 1368 (2015) for appellant to be constantly monitored for the protection of the public.

Relevant Facts

South Carolina Code §23-3-540 (A) provides that any person convicted of or pleading guilty to criminal sexual conduct with a minor in the third degree (formally lewd act on a minor) *must* be ordered to be electronically monitored upon release. Assistant Solicitor Mark Moyer argued that a hearing was not even required because the provisions of S.C. Code §23-3-540 were mandatory in regards to appellant having to be electronically monitored following his conviction. Tr. 3, l. 2 – 4, l. 17. A short hearing was nonetheless held on April 15, 2015.

Defense Counsel Scalzo argued under Grady v. North Carolina, 135 S.Ct. 1368 (2015), that the United States Supreme Court had held that electronic monitoring is a search. Therefore, the mandates of the Fourth Amendment apply. Consequently, for the search to be upheld it must be reasonable.

Further, Grady was decided after State v. Dykes, 403 S.C. 499, 744 S.E.2dd 505 (2013), wherein our Supreme Court approved electronic monitoring in the face of a Due process challenge. Counsel noted the present challenge was based on the Fourth Amendment, not Due process. R. 29, l. 21 – 39, l. 25. Counsel argued that the court had to make an "individualized" case specific – and not a "generalized" inquiry into whether the search resulting from the forced imposition of electronic monitoring upon **this appellant** was reasonable. R. 29, l. 21 – 33, l. 11.

The judge reasoned that our Supreme Court in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) found that the lifetime imposition of satellite monitoring was not unconstitutional, and it was not intended to punish sex offenders but instead to protect the public. The judge noted that appellant had pled guilty to a lewd act upon a minor, and he found that the electronic monitoring statute had a reasonable and rational basis of protecting the public. R. 33, l. 21 – 37, l. 15.

Again, defense counsel told the judge that Dykes involved a due process analysis and not a Fourth Amendment claim such as that in Grady v. North Carolina, and in the present case. Further, Grady was decided after Dykes. Counsel argued that under a Fourth Amendment analysis that there had been **no evaluation** whatsoever by the state of appellant's potential for reoffending before demanding that the court order him to be electronically monitored. Counsel argued that this was "general crime prevention" rather than a search constitutionally justified by its individual reasonableness. R. 37, l. 21 – 40, l. 1. The judge summarily stated, without any analysis, that he was considering appellant's "past history" when ordering that he be electronically monitored. [2] R. 40, ll. 1-14.

Discussion

GPS monitoring is mandatory for anyone convicted of criminal sexual conduct with a minor in the third degree. (formerly lewd act on a minor). See, S.C. Code §23-3-540(A). However, Grady v. North Carolina, 135 S.Ct. 1368 (2015), decided subsequent to State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013), holds that such electronic monitoring is a search, and

---

[2] Defense counsel reminded the judge that the issue of electronic monitoring "did not come up until after the plea [to the lewd act charge] was accepted and we had to deal with it. So I don't want it to appear that he, in essence, was waiving it or somehow giving up the challenge to it." The judge said that he understood appellant's position. R. 41, ll. 4-10.

under the Fourth Amendment for it to be constitutional it must be a reasonable search. That meant that the court obviously had to access the individual circumstances of the particular case and person before the Court.

As in Grady v. North Carolina, there was no individualized analysis as it pertained to this particular appellant being subjected to constant electronic monitoring. The judge only stated in passing that he considered appellant's "past history." R. 37, l. 21- 40, l. 14. Further, it appears that the sexual encounter in this case was consensual although illegal due the minor girl's age. Further -- and by no means to excuse the offense -- there was evidence the minor was a troubled disobedient, dishonest minor. "[T]he allegations are that in the summer of 2011, the victim went to the home of the defendant along with her cousin, and while she was there, at that time, the defendant did have sexual intercourse with her." R. 2, l. 1 – 20, l. 19; R. 20, l. 24 – 21, l. 2.

Regardless, the judge simply did **not make any on-the-record ruling why he reasoned it was reasonable for this particular appellant to be constantly electronically monitored for the protection of the public.** R. 28, l. 14 – 29, l. 2. It is elementary that such electronic monitoring is a major intrusion into a person's life, it is expensive, and that it implicates his liberty interests. See State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013).

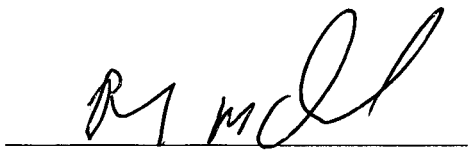
As in Grady v. North Carolina, the remedy should be that the order that appellant be electronically monitored should be vacated, and this case remanded for an individualized assessment of why the continued search of appellant by electronic monitoring in this case is unreasonable or reasonable. The judge did not undertake any analysis in this case before applying the mandatory provisions of S.C. Code § 23-3-540 (A) to appellant by ordering that he be electronically monitored. The judge's ruling in this case, as in Grady v. North Carolina, cannot withstand Fourth Amendment scrutiny, it should be vacated, and this case remanded for a

proper hearing on the reasonableness of the continued 24/7 search of appellant's whereabouts by the state.

CONCLUSION

By reason of the foregoing argument, the order that appellant be subjected to electronic monitoring should be vacated, and this case remanded for individualized fact findings and a hearing as to the reasonableness of the electronic monitoring of appellant.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of October, 2016

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 4th, 2016

Robert M. Dudek
Chief Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

DEVAROUS S.L. PARKS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Matthew C. Buchanan, Esquire, at Department of Probation, Parole and Pardons, 2221 Devine Street, P.O. Box 50666, Columbia, SC 29250 this 4th day of October, 2016.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of October, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.