STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID WILKINS ROSS,

APPELLANT

APPELLATE CASE NO. 2016-000738

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court err in ordering GPS monitoring for Appellant Ross pursuant to S.C. Code Section 23-3-540 (E) because in Grady v. North Carolina, 135 S. Ct. 1368 (2015) the U.S. Supreme Court found that GPS monitoring is a Fourth Amendment search requiring a reasonableness analysis which renders Section 23-3-540(E) unconstitutional since it mandates GPS monitoring for every person who violated probation from his conviction of attempted lewd act on a child under sixteen; and GPS monitoring in Appellant Ross's case was unreasonable since he has the lowest risk of reoffending as found by Dr. William Burke?

STATEMENT OF THE CASE

On July 25, 1979, Appellant Ross was convicted of attempted lewd act on a minor and received a sentence of six years imprisonment suspended to five years probation. On February 14, 1981, the six year sentence was revoked in full on a probation violation, and Ross was incarcerated. R. 91; R. 2, ll. 1 – 9; R. 74. On January 19, 2011, Ross was convicted in Greenville County Magistrate Court of a violation of the Sex Offender Registry by failing to register. R. 2, ll. 10 – 17. The Magistrate Court did not issue an order requiring a Global Positioning Satellite (GPS) device for Ross. However, the Department of Probation, Parole, and Pardon Services (DPPPS), placed him on GPS monitoring as mandated by S.C. Code Section 23-3-540 (E). R. 2, ll. 10 – R. 3, ll. 4.

On October 26, 2015, a hearing was held before the Honorable Robin B. Stilwell where DPPPS moved for an order placing Appellant Ross on a GPS device pursuant to S.C. Code Section 23-3-540 (E). R. 2, ll. 1 – 5. DPPS was represented by Matthew Buchanan, and Appellant Ross was represented by Chris Scalzo and Teal Johnson. R. 1.

Defense counsel argued that Section 23-3-540(E) was unconstitutional following a decision by the United States Supreme Court in Grady v. North Carolina, 135 S.Ct 1368 (2015) which held that GPS monitoring was a search under the Fourth Amendment and was subject to a **reasonableness analysis**. R. 8, ll. 7 – R. 10, ll. 14. Judge Stilwell took the case under advisement. He issued an order on November 23, 2015 finding that Section 23-3-540 (E) mandated the court to place Appellant Ross on GPS monitoring to be followed by DPPS.

STATEMENT OF FACTS

On July 29, 1979 Appellant Ross was convicted of attempting a lewd act on a prepubescent niece which was his only sexual offense, and which he denied. R. 73; R. 87. He served eight years in prison and was placed on the Sex Offender Registry. R. 2, ll. 1 – 9; R. 73. He was convicted on January 19, 2011 in Greenville Magistrate Court of violating the Sex Offender Registry Act by failing to register. R. 2, ll. 10 – R. 3, ll. 4. As a result, DPPS placed him on GPS monitoring although magistrate's court had not ordered it. DPPPS, as a "departmental policy," brought the case back to court for an official order. R. 2, ll. 19 – R. 3, ll. 4.

DPPPS argued to the court that GPS tracking under Section 23-3-540(E)) was lifetime. However, the Supreme Court in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013), allowed for a review after the person had worn the device for ten years. The DPPPS attorney requested that the judge make the order retroactive to the date Ross was placed on GPS monitoring so that Ross would be about four or five years closer to the ten year review. The judge said he would decide that point. R. 6, ll. 14 – R. 7, ll. 15.

Defense counsel than argued that he wanted to address the automatic nature of Subsection (E) of the statute that mandated the GPS monitoring without leaving any discretion to the court. Counsel argued the case of Grady v. North Carolina, 135 S. Ct. 1368 (2015) where the United States Supreme Court held that "physically attaching an electronic monitor to a person's body was a search by the state and was subject to the Fourth Amendment." Counsel pointed out that the case specifically cited the **reasonableness** required by the Fourth Amendment. R. 7, ll. 23 – R. 9, ll. 2.

Counsel argued that this Grady case made Subsection (E) of 23-3-540 unconstitutional because the requirement of GPS monitoring could no longer be automatic since a **reasonableness analysis** was now required. Counsel pointed out that the South Carolina Supreme Court had rejected the Fourth Amendment reasonableness analysis in the Dykes case based on Subsection (E), which was prior to Grady. However, the U.S. Supreme Court in Grady ruled that the monitoring was a Fourth Amendment search. Counsel stated that the Grady court ruled that there had to be a balancing between the invasion of the individual's **rights** versus the state's interest. R. 9, ll. 3 – R. 10, ll. 14.

The DPPPS attorney argued that the South Carolina Supreme Court had not taken the position that North Carolina did in Grady that GPS was not a search. The South Carolina Supreme Court, he argued, had already analyzed GPS tracking as a reasonable search in Dykes and found pursuant to the Kennedy/Mendoza factors, that GPS was a civil matter, and was not punitive. Therefore, "the analysis of whether or not it was a reasonable search was taken care of." The DPPPS attorney stated that the U.S. Supreme Court denied cert on Dykes and State v. Nation, 408 S.C. 474, 759 S.E.2d 428 (2014), a case very similar to Dykes. Then a month later, counsel pointed out, the U.S. Supreme Court reviewed Grady. That meant, the DPPPS attorney argued, that the South Carolina Supreme Court was correct. R. 11, ll. 1 – R. 13, ll. 6.

Defense counsel disputed that logic, and said that the denial to review by the U.S. Supreme Court made "no comment" on the "validity of anything done by the lower courts." Counsel believed that the U.S. Supreme Court decided to review Grady because of its application to many states including South Carolina. He argued that the South Carolina Supreme Court did not analyze the Fourth Amendment issue but simply rejected it in a

footnote. Because the U.S. Supreme Court had decided that attaching a GPS monitor to a person's body was a search, the states and federal government must now apply the Fourth Amendment to those cases where the government was trying to order a GPS monitor. Counsel said: "The statute does not trump the Fourth Amendment." R. 13, ll. 10 – R. 14, ll. 15.

Defense counsel then said the second issue was that it had to be an individualized assessment for Ross. Reasonableness was in the category of probable cause just as with a crime. The purpose of the statutory article as stated in the Sex Offender Registry, 23-3-400, where Section 23-3-540(E) was entered, was to serve as a "tool for law enforcement in investigating criminal offenses" and to protect the communities from offenders. R. 15, ll. 8 – R. 19, ll. 4.

Counsel pointed out that in the case of GPS monitoring, the crime had already occurred and been resolved. Therefore, counsel argued the person had to have shown some level of risk for reoffending. R. 19, ll. 5 – R. 20, ll. 20.

The DPPPS attorney responded that the statute did individualize the GPS tracking as GPS was only ordered in specific cases where the person had committed CSC with a minor first degree or a lewd act on a minor which was changed to CSC with a minor third degree. Then it was ordered for those who were under supervision and could not abide by the rules. That violation then required GPS monitoring. Then it was ordered for those who failed to register on the Sex Offender Registry. R. 20, ll. 22 – R. 22, ll. 25.

Defense counsel said that Dykes was decided on a substantive due process analysis and was not a fundamental right according to the Court. The Supreme Court said that GPS monitoring for certain child sex crimes "satisfied the rational relationship test" to the

purpose of the statute. Counsel argued that the U.S. Supreme Court in Grady chose a higher standard than the rational basis test. Their standard was an individualized analysis as required by the Fourth Amendment. R. 24, ll. 9 – R. 26, ll. 14.

Counsel then told the court that risk could not be measured by the particular offense with which the person was charged. Counsel then asked to present evidence of particular facts related to Appellant Ross to show that he posed a low risk of reoffending. R. 25, ll. 12 – R. 29, ll. 2.

Counsel then called as a witness Dr. William Burke who had evaluated Appellant Ross. R. 31, ll. 13 – R. 32, ll. 11.

Dr. Burke was qualified by the court as an expert in psychosexual evaluation and treatment without objection. R. 35, ll. 7 – 13. Dr. Burke testified that he evaluated Appellant Ross regarding his risk to reoffend sexually. He used twelve different tests to evaluate Ross. Dr. Burke found that Ross "**came out in the lowest category of risk.**" R. 40, ll. 25 - R. 42, ll. 1. Appellant Ross was sixty years old when Dr. Burke evaluated him on October 20, 2015 just prior to this hearing. R. 42, ll. 2 – 8; R. 71.

Dr. Burke explained that two points were subtracted from the level of risk score because as the man got older, there was a decrease in testosterone and the less likely he was to reoffend. R. 42, ll. 9 – R. 43, ll. 11. Dr. Burke reported that the greatest predictor of recidivism was the positive arousal to children in the penile plethysmography (PPG) laboratory. PPG measured direct blood flow to and from the penis which was the only way to determine sexual arousal. R.36, ll. 25 – R. 37, ll. 18; R. 43, ll. 12 – 23. Appellant Ross did not have a physiological response to anything in the laboratory. R. 44, ll. 4 – 13.

Dr. Burke testified that Ross did not respond to children in the laboratory. On the visual preference test, Ross showed no sexual interest in children. He did show sexual interest in adult males and females on that test. R. 44, ll. 14 – R. 45, ll. 24. Dr. Burke explained that now pedophilia meant that a person was aroused by children but did not act on it. The diagnosis of pedophilic disorder meant that a person acted on that arousal to children. When tested, Ross did not meet the criteria for pedophilia nor pedophilic disorder. R. 44, ll. 14 – R. 46, ll. 2.

According to Dr. Burke, Ross did not respond to anything that indicated Ross was a risk to the community. R. 47, ll. 8 – R. 48, ll. 4. Dr. Burke's report was marked as Court's Exhibit 2. R. 48, ll. 1 – R. 49, ll. 12.

Defense counsel then argued that based on this evaluation, a reasonableness analysis needed to be done that was individual to Appellant Ross. Counsel emphasized that the evaluation testing was an extremely "individualized" process for Ross. Twelve tests had been administered which indicated that Ross posed a low risk of reoffending. If the goal of GPS monitoring was to be able to investigate the likelihood of a future crime, it was not reasonable under the Fourth Amendment. Counsel argued that because Ross was found to be a low risk for reoffending, it was unreasonable to order him to submit to GPS monitoring. R.50, ll. 3 – R. 51, ll. 6.

The judge said he would read the memorandum of each part, and take the matter under advisement. R. 51, ll. 8 – R. 52, ll. 12.

On November 23, 2015, the judge issued an order requiring Appellant Ross to be monitored by DPPPS with an "active electronic monitoring device (GPS)". In his order, the judge relied on State v. Dykes, *supra*, for the finding that mandatory imposition of GPS

monitoring was a "reasonable exercise of government authority under a constitutional due process analysis." The judge wrote that the holding in Grady v. North Carolina, *supra,* was that the states must review civil remedies in the "context of constitutional due process and the citizens' reasonable expectations of privacy." He found that the South Carolina Supreme Court had already analyzed this issue within the constitutional due process as prescribed by the U.S. Supreme Court which North Carolina had not done.

ARGUMENT

The circuit court erred in ordering GPS monitoring for Appellant Ross pursuant to S.C. Code Section 23-3-540 (E) because in Grady v. North Carolina, 135 S.Ct. 1368 (2015) the U.S. Supreme Court found that GPS monitoring is a Fourth Amendment search requiring a reasonableness analysis which renders Section 23-3-540(E) unconstitutional since it mandates GPS monitoring for every person who violated probation from his conviction of attempted lewd act on a child under sixteen; and GPS monitoring in Appellant Ross's case was unreasonable since he has the lowest risk of reoffending as found by Dr. William Burke.

Title 23 is named: Law enforcement and Public Safety. Under this Title 23 are the Sex Offender Registry statute and Section 23-3-540(E). South Carolina Code Section 23-3-540 (E), provides:

> A person who is required to register pursuant to this article for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655 (A)(1), or criminal sexual conduct with a minor in the third degree, pursuant to Section 16-3-655 (C), and who violates a provision of this article, must be ordered by the court to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

Section 23-3-540(E) was amended effective June 18, 2012, when the Legislature substituted criminal sexual conduct with a minor in the third degree for lewd act on a child under sixteen.

Section 23 -3-400 provides:

> The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens. Notwithstanding this legitimate state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws.

> The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013), the South Carolina Supreme Court held that the initial mandatory imposition of satellite monitoring for certain child sex offenders did not violate due process pursuant to the Fourteenth Amendment. However, the Court determined that the statutory requirement of lifetime monitoring without judicial review of risk assessment of reoffending did violate constitutional due process. Dykes was convicted of committing a lewd act on a minor and was sentenced to fifteen years in prison suspended to three years in prison and five years probation. Upon her release, she violated probation and was placed on mandatory GPS monitoring pursuant to Section 23-3-540 (C).

Dykes objected to the lifetime monitoring, as unreasonable given the facts of her case. The Supreme Court based their opinion on the due process clause of the Fourteenth Amendment. The Court found that GPS monitoring satisfied the rational relationship test to the General Assembly's purpose of protecting the public from not only sex offenders but from those who may reoffend. In Footnote 9, the Court wrote that Dykes asserted other constitutional violations of procedural due process. The Court then cited Florida v. Jimeno,

500 U.S. 248 (1991) for the holding that the Fourth Amendment did not proscribe all state-initiated searches and seizures but only those which were unreasonable.

Justice Hearn wrote a dissent in Dykes and in State v. Nation, 408 S.C. 474, 759 S.E.2d 428 (2014), that she believed the initial imposition of satellite monitoring without an "individualized" determination of the likelihood of reoffending violated the person's right to substantive due process.

State v. Nation, id. was a case similar to Dykes as he violated probation and was placed on mandatory GPS monitoring. The Supreme Court held that this mandatory imposition was not cruel or unusual punishment.

In Grady v. North Carolina, 135 S.Ct. (2015), the United States Supreme Court analyzed the imposition of satellite monitoring for recidivist sex offenders. The Court held that where the government obtains information by physically intruding on a constitutionally protected area, a search within the meaning of the Fourth Amendment had occurred. The Court also held:

> A state conducts a search within the meaning of the Fourth Amendment when it attaches a device to a person's body without consent, for the purpose of tracking that individual's movements.

The Court found that North Carolina's program under which recidivist sex offenders could be subjected to satellite-based monitoring constituted a Fourth Amendment search as the program was designed to obtain information and did so by physically intruding on the person's body. The Court held that the Fourth Amendment's protection extended **beyond the sphere of criminal investigations.** The Fourth Amendment prohibited unreasonable searches, and whether a search was unreasonable depended on the totality of the

circumstances including the nature and purpose of the search and the extent to which the search intruded on reasonable privacy expectations.

The Grady Court cited United States v. Jones, 132 S.Ct. 945 (2012), where the Supreme Court held that the government's installation of a GPS device on the subject's vehicle, and its use of that device to monitor the vehicle's movements, constituted a search. The Court also cited Florida v. Jardines, 133 S.Ct. 1409 (2013), where the Court held that having a drug-sniffing dog nose around a suspect's front porch was a search because the police had gathered information by physically entering the curtilage of the home without permission of the owner. The Court wrote that in light of those decisions, it "followed that a state also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."

The Grady Court wrote that the North Carolina court did not examine whether the state's monitoring program was reasonable when properly viewed as a search. The Supreme Court vacated the judgment of the Supreme Court of North Carolina and remanded the case for proceedings not inconsistent with their opinion.

In State v. Nation, *supra,* the South Carolina Supreme Court held that a statute will not be declared unconstitutional unless its repugnance to the Constitution is clear beyond a reasonable doubt.

The cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature. State v. Thomas, 372 S.C. 466, 642 S.E.2d 724 (2007), State v. Scott, 351 S.C. 584, 571 S.E.2d 700 (2002). The Supreme Court will not construe a statute to do that which is unconstitutional. Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000).

Penal statutes are to be construed strictly against the State and in favor of the defendant. Id., State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991), State v. Dawkins, 352 S.C. 162, 573 S.E.2d 783 (2002). The reason for the statute-that is, the motives which led to the making of it, the object in contemplation at the time the Act was passed- is another criterion by which to ascertain the true meaning of the Act. State v. Shaw, 9 S.C. 94 (1878).

The circuit court judge erred in ruling that the S.C. Supreme Court had analyzed the Fourth Amendment issue in Dykes. As defense counsel wrote in his Memorandum in Opposition to the State's Request for GPS Monitoring under S.C. Code Section 23-3-540(E) in Footnote 2 of Dykes, the South Carolina Supreme Court addressed only the proposition that only unreasonable searches violated the Fourth Amendment as held in Florida v. Jimeno, 500 U.S. 248 (1991).

The judge did not address the Fourth Amendment issue in his order but relied solely on the Dykes decision where GPS monitoring was analyzed under due process of the Fourteenth Amendment. S.C. Code Section 23-3-540(E) is "repugnant" to the United States Constitution when it mandates GPS monitoring without a determination of **reasonableness based on an individualized assessment of risk considering the totality of the circumstances** as held in Grady.

Justice Hearn's dissents in both Dykes and Nation demonstrate her belief that the statute is unconstitutional where it mandates initial imposition of GPS monitoring without an "individualized determination" of the likelihood of reoffending. Although Justice Hearn refers specifically to Subsection (C), that subsection is essentially the same as Subsection (E) except (C) concerns people who violated probation and (E) concerns people who violate the Sex Offender Registry as in Ross's case.

This "individualized determination" of the likelihood of reoffending is the same as a determination of reasonableness as described by the Court in Grady.

The North Carolina statute, which the U.S. Supreme Court held unconstitutional, is similar to the South Carolina statute as both have the same purpose: the collection of information and public safety. In Dykes, the Supreme Court held that in light of the General Assembly's purpose of protecting the public from sex offenders and aiding law enforcement, the initial imposition of GPS satisfied the rational relationship test. Thus, the Court said the purpose of GPS monitoring is to collect information to aid law enforcement and to protect the public.

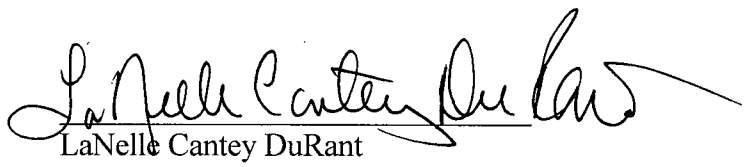
Ross was evaluated pertaining to his risk of reoffending and was found to be in the **"very lowest risk category**." He was found to be a low risk of harm to the community. Therefore, based on his individualized assessment of risk, it was unreasonable, based on the totality of the circumstances, for Ross to be placed on GPS monitoring. The judge should have done a determination of reasonableness because placing the GPS on Ross constituted a search pursuant to the Fourth Amendment.

The United States Supreme Court ruled in Grady v. North Carolina, *supra,* that GPS monitoring is a search pursuant to the Fourth Amendment. Therefore, the search must be reasonable which requires a reasonableness analysis for that particular person and not the category of persons based on the totality of the circumstances. As to Appellant Ross, GPS monitoring is unreasonable because he has the lowest risk of reoffending.

CONCLUSION

Based on the above, the order of the circuit court should be vacated and the case remanded for an order removing Appellant Ross from GPS monitoring.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of January, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

January 23, 2017

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon Matthew Buchanan, Esquire, at S.C. Department of Probation, Parole and Pardon Services, Post Office Box 50666, Columbia, SC 29250, this 23rd day of January, 2017.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of January, 2017.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.