STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
The Honorable J. Cordell Maddox, Circuit Court Judge

Appellate Case No. 2016-000560

THE STATE,.....RESPONDENT

v.

SHAWN ALLEN MITCHELL,.....APPELLANT

INITIAL BRIEF OF RESPONDENT

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ATTORNEY FOR RESPONDENT

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Whether this court shall issue an Order to dismiss this appeal based upon the appellant's failure to file and serve his brief within the time prescribed in accordance with Rule 208(a)(4) of the SC Appellate Court Rules?

Whether the court erred by ordering GPS monitoring of the appellant under the mandatory provisions of S.C. Code 23-3-540(E) 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 or about July 8, 1997, the Appellant did willfully and lewdly commit or attempt a lewd and lascivious act upon or with the body of a child under the age of sixteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of himself or such child. On November 10, 1997, the Appellant pled guilty to the charge of committing a lewd act on a child under sixteen and was given a sentence of five years. Pursuant to Section 23-3-430, the Appellant was required to register as a sex offender immediately upon his release from prison.

On March 29, 2001, the Appellant was charged with a sex offender registry violation – failure to register. On May 15, 2001, the Appellant pled guilty to this offense and was given a ninety-day sentence. On February 7, 2012, the Appellant was charged with a second offense of failure to register. On March 7, 2012, the Appellant was charged with Larceny/Grand Larceny, value more than $2,000 but less than $10,000. On May 27, 2012, the Appellant pled guilty to the 2nd offense, failure to register charge and was given a sentence of 366 days for this charge. On the same day, the Appellant also pled guilty to the Larceny/Grand Larceny charge and was given a sentence of five years, suspended to 366 days and two years of probation.

On August 4, 2014, a Consent Order was issued by the Anderson County Circuit Court to extend the Appellant's probation for two years, turn his probation case to PTUP and after his completion of his drug and alcohol counseling with Vocational Rehabilitation in response to several probation violations including a positive drug test for cocaine and failing to attend counseling among others.

On November 17, 2014, the Appellant appeared before the Honorable J. Cordell Maddox for a probation violation and GPS hearing. The Appellant represented himself at this hearing. The Department was represented by the undersigned counsel and Agent Scott Metcalf. Judge Maddox

did grant the Appellant fifteen days to obtain legal representation to dispute the statutory mandate that he be placed on GPS. The Appellant failed to obtain an attorney within the fifteen day requirement per Judge Maddox's instructions (Nov. 17 2014 Tr. 12, lines 14-20). Despite that fact, Judge Maddox did sign a Proposed Order that was given to him that day on November 18, 2014. This Order required the Appellant to be monitored with an electronic monitoring device (or GPS) as required pursuant to SC Code §23-3-540(E). Within the following days after this hearing, the Appellant absconded and warrants for his arrest were issued by the Department and the Pickens County Sheriff's Office for violations and failing to register, respectively.

On February 27, 2015, the Appellant's probation was revoked for a year for probation violations of using illegal controlled substances, failure to follow the advice of his agent, and failing to pay supervision fees by the Honorable R. Lawton McIntosh. His probation was also tolled while in SCDC and it was extended for one year with a restructuring of fines.

On May 28, 2015, the Appellant's attorney, Brian Horrocks, filed a Motion to Quash the Order issued by Judge Maddox on November 18, 2014. On June 8, 2015, the Respondent filed a Memorandum in Opposition to the Appellant's Motion to Quash. On July 8, 2015, the Appellant's attorney, Brian Horrocks, filed a Memorandum in Opposition to Order Imposing Lifetime Electronic Monitoring with the Anderson County Circuit Court. After a July 13, 2015 hearing regarding this matter, Judge Maddox issued an Order on March 2, 2016 requiring that the Appellant be monitored by the Department. The Appellant is currently scheduled for another probation violation hearing in Pickens County on May 26, 2017 for continued illegal drug use and failing to report to his agent among other violations.

ARGUMENTS

The Appellant failed to file this appeal within the time allotted pursuant to the rules of the Court of Appeals as required by Rule 208(a)(4), SCACR and State v. Serrette, 375 S.C. 650 (2007).

In this appeal, the Appellant is challenging an Order that was issued on March 2, 2016. On March 10, 2016, Hervery B. O. Young, the Appellant's attorney, filed a Notice of Appeal. On October 18, 2016, the Appellant's attorney, Lanelle Durant, sent a letter to the Clerk of Court for the Court of Appeals asking for this case to be held in abeyance due to the need to acquire additional transcripts. On November 4, 2016, the Clerk of Court issued an Order holding this appeal in abeyance for a period of sixty days. On January 12, 2017, the Clerk of Court issued a letter advising that this matter was no longer to be held in abeyance after being advised by the Appellant's Counsel that the transcripts had been delivered. The letter also advised that Appellant's initial brief and designation of matter would be due to be filed on February 9, 2017. Nevertheless, the Respondent did not receive the Appellant's unfiled initial brief until March 30, 2017.

Rule 208(a)(4) of the SC Appellate Court Rules (SCACR) states: "Upon the failure of the appellant to file and serve his brief within the time prescribed, the clerk of the appellate court shall sign an order *dismissing the appeal*... Upon the failure of respondent to timely file a brief, the *appellate court may take such action as it deems proper*." (Emphasis added.) Thus, this court has the discretion to dismiss this appeal based upon untimeliness.

In State v. Serrette, 375 S.C. 650, 652 (2007), the SC Court of Appeals recognized Rule 208(a)(4), SCACR as one of the ways that a criminal defendant may lose their right of appeal. The Court also noted that an appellant's actions may have an "impact on the appellate process sufficient to warrant an appellate sanction" and noted that an appellant's actions that "...so delay the onset

of appellate proceedings that the Government would be prejudiced....We recognize that this problem might, in some instances, make dismissal an appropriate response." The Court went on to dismiss Serrette's appeal accordingly. *Id.*

In this current matter, the Appellant's actions of delay and continuous violations have the same "kind of connection to the appellate process that [justifies] an appellate sanction of dismissal." *Id.* Thus, the Respondent respectfully asks that this court dismiss this appeal accordingly.

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) did not render S.C. Code §23-3-540 unconstitutional.

In his appeal, the appellant challenges South Carolina Code §23-3-540(E) (Supp. 2015), which requires mandatory satellite monitoring for an offender who violates the sex offender registry, if that offender is on the registry through a conviction of Criminal Sexual Conduct with a Minor in the first degree and in the third degree (formerly Lewd Act on a Minor).[1] Subsection (E) is part of South Carolina's Sex Offender Accountability and Protection of Minors Act, commonly known as Jessie's Law. Throughout the country, numerous states enacted increased monitoring of sex offenders in response to the abduction, rape and murder of Jessica Lunsford by a convicted sex offender in Florida. South Carolina codified its version of Jessie's Law in S.C. Code §23-3-540.

The matter was brought before the trial court to resolve a matter in which the appellant had violated the sex offender registry by failing to register as a sex offender. South Carolina Code §23-3-540(E) states that the court *must* order the individual to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device. Id. However, the order was not imposed at the initial finding of guilty in the Anderson magistrate court.[2] As a

[1] The General Assembly renamed and re-codified Committing or Attempting Lewd Act on a Minor to Criminal Sexual Conduct with a Minor in the Third Degree on June 18, 2012.

[2] Although the statute is silent as to which court may impose the order imposing the GPS monitoring, the Department has taken the position that the proper venue is the Circuit Court.

remedial measure, the Department brought the case before the Tenth Judicial Circuit Court to request the order that is required in §23-3-540(E).

Nevertheless, the registry and electronic monitoring *statutes are mandatory* and primarily involve the tracking of sex offenders such as the Appellant after they've completed their sentences. The electronic monitoring requirements do not depend upon the time of sentencing, but are automatically activated upon the Sex Offender requirements. See SC Code §§23-3-440-540 and State v. Boggs, 388 S.C. 314, 316-317 (2010) in which the SC Court of Appeals reversed a circuit court for not following the *mandatory statutory language* of §24-13-30. (Emphasis added.)

The appellant objected to the Department's motion for the order requiring the satellite-based monitoring, arguing that the Supreme Court's holding in Grady makes South Carolina's Jessie's Law unconstitutional.

The appellant argues that the holding in the U.S. Supreme Court case Grady v. North Carolina, 135 S.Ct. 1368 (2015) struck down North Carolina's satellite-based monitoring program as unconstitutional and by extension South Carolina's statute as well. 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 affirmed 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. Id., 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, when it remanded the case the Court did not give instructions on the remedial measures that North Carolina was to take.

The Seventh Circuit Court of Appeals did not read into Grady the sort of expansive reading that the appellant insists upon. "[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).

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. The appellant claims that the holding found North Carolina's statute unconstitutional. App. Br. p. 16. This is not supported in the Supreme Court's opinion. ("That conclusion [that satellite monitoring is a search], however, does not decide the ultimate question of the program's constitutionality." Grady at 1371.) Instead, the Court remanded the issue so the North Carolina courts could examine whether its monitoring program is reasonable when viewed as a search. Id. The Court made no mention of an examination of the individualized reasonableness that the appellant reads into the opinion. Rather, the Court remanded the case 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 a lifetime GPS monitoring system wasn't a search at all, the South Carolina Supreme Court held that in the context of the Fourth Amendment, such a search was reasonable. *See* Dykes, fn 9.

The Court in Dykes did find it unconstitutional to have no judicial review whatsoever when dealing with Criminal Sexual Conduct with a Minor 1st Degree and 3rd Degree. To that end, the Court struck the final sentence of §23-3-540(H), essentially granting all individuals the opportunity to petition the court to have the device removed after ten years with the device, and five years thereafter. By ensuring judicial review to all individuals subject to the monitoring program, the statute was made constitutional.

It is also worth noting that the appellant in State v. Nation, 408 S.C. 474, (2014) appealed his case to the U.S. Supreme Court. Nation is a case "factually and legally indistinguishable" from Dykes. Nation, at 482. The Supreme Court denied certiorari on March 9, 2015, less than a month

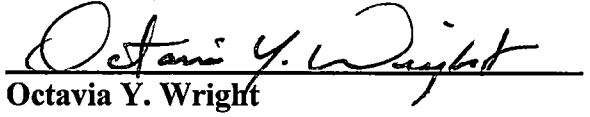
before the Court issued its ruling in Grady. Nation v. South Carolina, 135 S.Ct. 1534 (2015). Had the Court felt that South Carolina's monitoring program was unconstitutional, it had a perfect opportunity to take up that case while deliberating about the issues in Grady. Because it elected to deny certiorari, the proper conclusion is that South Carolina's program is constitutional.

Therefore, the trial court in this case did not need to conduct an individual assessment of reasonableness to order the appellant to be electronically monitored. It was sufficient that the court follow the mandates of §23-3-540(E). In Grady, the U.S. Supreme Court simply corrected an erroneous holding by North Carolina's courts, and consequently its opinion has no impact on South Carolina law.

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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