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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Robin B. Stillwell, Circuit Court Judge

Appellate Case No. 2016-000738

THE STATE,.....RESPONDENT

v.

DAVID WILKINS ROSS,.....APPELLANT

FINAL 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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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(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

The State agrees with the Appellant's Statement of the Case.

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) 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 Greenville 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 Thirteenth Judicial Circuit Court to request the order that is required in §23-3-540(E).

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,

Matthew C. Buchanan
General Counsel

South Carolina Department of Probation
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

Attorney for the Respondent

Columbia, South Carolina
January 11, 2017

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.

Matthew C. Buchanan
General Counsel

January 11, 2017

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated January 11, 2017, on Appellant this 11th day of January, 2017, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Lanelle DuRant
SC Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

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

Dawn K. Nichols
Executive Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
Governor

JERRY B. ADGER
Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.state.sc.us/ppp

January 11, 2017

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

RE: State v. David Wilkins Ross

Dear Ms. Kitchings:

Enclosed please find the original and nine (9) copies of the *Final Brief of Respondent*, along with proof of service in the above-referenced case.

Thank you for your assistance in this matter.

Sincerely,

Matthew C. Buchanan
General Counsel

MCB:dn
Enclosures

cc: Lanelle DuRant, Appellate Defender