Another Batch of Satellite-Based Monitoring Cases

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The last round of opinions from the court of appeals included three related to satellite-based monitoring (SBM) of sex offenders. None of them broke any major new ground, but two more dissents show that nothing is fully settled in this rapidly evolving area.

In State v. Gardner, the court found the defendant, who was recently released from prison to post-release supervision, to be a recidivist and ordered him to enroll in SBM for life. At the determination hearing, the defendant argued that SBM was an invalid ex post facto punishment and violated double jeopardy principles. The trial court acknowledged in its order that Mr. Gardner might have a point, but said the issue wouldn't be ripe for review until he finished his term of post-release supervision. The court's idea, I think, was that because post-release supervisees are required to submit to SBM as a condition of supervision under G.S. 15A-1368.4(b1)(6), SBM for life-the regime that defendants have been arguing adds to their punishment-doesn't actually begin until formal supervision ends. It's not a bad argument, although as it turns out it may yet violate the Ex Post Facto Clause to add a mandatory condition of supervision to cases based on crimes that occurred after passage of the legislation adding the condition-that's what happened in Commonwealth v. Cory, 911 N.E.2d 187 (Mass. 2009), as discussed in my comment to this post. Regardless, the appellate court's problem with the trial court order in *Gardner* was with its clarity, not its constitutionality. In one place the order said SBM was for life, in another place it said SBM was just a condition of post-release supervision. The court of appeals remanded the case for the trial court to clear up the ambiguity.

Up next is State v. Hagerman, in which a defendant was ordered to enroll in SBM for life after the trial court determined his indecent liberties convictions were aggravated offenses. The defendant argued that the court's determination violated his Sixth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by increasing his punishment based on facts not presented in an indictment, admitted to, or found by a jury beyond a reasonable doubt. Because SBM is not punishment, the court of appeals held, Mr. Hagerman's sentence was not increased, and *Apprendi* wasn't implicated. Judge Elmore dissented, noting his continued belief (expressed in other dissents, including one I'll discuss in a moment) that SBM is punishment, and is therefore subject to *Apprendi*'s jury-proof requirements. *Hagerman* does *not* address the question of whether aggravated offense determinations may rest only on the elements of the conviction offense, or whether the court may also look to the facts behind the conviction. (I discussed this issue, which is a question of statutory interpretation, in an earlier post.) The trial court in Mr. Hagerman's case must have looked to the facts (indecent liberties does not include penetration as an element), but the defendant did not raise the statutory interpretation argument on appeal, and the court of appeals therefore did not discuss it. The issue will be more squarely before the court soon.

Finally comes State v. Vogt, a case involving a recidivist offender ordered to enroll in SBM for life, in which the court of appeals once again rejected a defendant's argument that monitoring is ex post facto punishment. Mr. Vogt also argued that the trial court's SBM order rendered his guilty plea invalid because "he could not have been advised that he would be subjected to lifetime satellite-based monitoring . . . since such monitoring did not exist at the time that he entered his guilty plea." A problem with that argument, the court of appeals noted, is that the defendant's plea to his most recent sex crime was entered in June of 2008, almost two years after the SBM statute became effective. Judge Elmore dissented, again taking judicial notice of the Division of Community Correction's interim policy on sex offender management to conclude that SBM amounts to ex post facto punishment. The majority did not question the dissent's

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authority to take judicial notice of the DCC policy, but it did express concern about introducing "a large volume of additional information which has not been subjected to adversarial testing in the trial courts." Such testing would, I think, sort out which provisions in the interim policy are applicable to sex offenders on probation or post-release supervision (warrantless searches, curfews, and notification of church officials), and which actually apply to offenders enrolled in SBM (a distinction I wrote about here). In a footnote, the majority practically invited a monitored offender to "challenge the validity of specific provisions of the interim guidelines . . . on the grounds that they violate state or federal law"-it just asked that the challenge come in an "appropriate proceeding" in the trial division, not through judicial notice on appeal.

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