Is the Court of Appeals Signaling Less Forgiveness with SBM cases?

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Maybe so, if two decisions from earlier this month are any indication. They are: State v. Bishop, ___ N.C. App. ___ (Oct. 3, 2017), where the court refused to consider arguments about the reasonableness of satellite-based monitoring ("SBM") when the issue was not preserved or properly appealed, and State v. Greene, ___N.C. App. ___ (Oct. 3, 2017), where the court refused to remand a SBM hearing when the State failed to present sufficient evidence of the reasonableness of SBM. Before I discuss those cases, some background first.

Following the U.S. Supreme Court decision in *Grady v. North Carolina*, 575 U.S. ___, 135 S. Ct. 1368 (2015), the state appellate division has seen a steady flow of SBM cases. North Carolina's sex offender registration statutes require automatic and lifetime SBM for certain categories of offenders (among them, recidivists and those convicted of aggravated offenses). *Grady* held that the imposition of SBM was a search for purposes of the Fourth Amendment and dictated that a trial court must determine the reasonableness of that search before imposing SBM. The Supreme Court did not offer much guidance as far as how these hearings would be conducted, stating only that "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes on reasonable privacy expectations." *Grady* at 1371.

Since *Grady*, the companion cases of *State v. Morris*, 783 S.E.2d 528 (2016) and *State v. Blue,* 783 S.E.2d 524 (2016) were decided, which gave the trial courts a little more guidance. We know after *Morris* and *Blue* that the State has the burden of proof at the hearing and that actual evidence needs to be presented concerning SBM for the trial court to conduct the balancing test required by *Grady* (as Jamie blogged about here). The defendant in *Blue* was convicted of an aggravated offense, and the defendant in *Morris* was a recidivist. Therefore, despite the statutory mandate that certain types of offenders are subject to mandatory lifetime SBM, the trial court must nonetheless conduct a hearing on the reasonableness of SBM. Merely referencing *Grady*, or stating that the court has considered the privacy rights of the defendant next to the State's interest in SBM, is not sufficient.

The defendants in *Morris* and *Blue* both objected to the SBM order under *Grady*, thus preserving their constitutional objections for appellate review (constitutional objections not made at trial will typically not be considered on appeal). It appears that both defendants also gave the proper notice of appeal for a SBM order—because SBM determinations are civil in nature, defendants wishing to appeal the order must comport with the rules for civil notice of appeal, namely, that the notice of appeal is written, signed, filed within 30 days of the entry of the order, and identifies the court and SBM order from which appeal is taken. Oral notice of appeal, while permissible for appeal of the judgment in a criminal case, is not sufficient for SBM, and appeal of a related criminal case does not confer jurisdiction on the appellate court to review the SBM order.

Until this month, the court of appeals has been mostly forgiving of mistakes in these procedures. For instance, in *State v. Robinson,* ___ N.C. App. ___, 791 S.E.2d 862 (2016), the court granted a petition for writ of certiorari to review a SBM order, despite a notice of appeal that was unsigned and failed to identify the order or court from which the appeal was taken (among other defects). *See also State v. Lunsford*, 791 S.E.2d 929 (2016) (unpublished) (same result); *State v. Farrow*, 793 S.E.2d 286 (2016) (unpublished) (same result). Similarly, when no objection was made when the court entered the SBM order, the court of appeals has at times invoked Rule 2 of the Appellate Rules of Procedure to

review SBM cases (Rule 2 suspends the Rules of Appellate Procedure to avoid a manifest injustice and allows review of a claim that was otherwise not preserved). In *State v. Modlin*, 796 S.E.2d 405 (2017) (unpublished), the court of appeals again granted a cert. petition to obtain jurisdiction over the SBM appeal and also invoked Rule 2 to review the constitutionality of the SBM order, despite a defective notice of appeal and without a constitutional objection at the hearing. *See also State v. Simmons*, 798 S.E.2d 441 (2017) (unpublished) (same result). *State v. Bishop* indicates that any grace period that defense counsel was getting as far as preservation of *Grady* issues and the proper manner of appeal of SBM orders is now over.

State v. Bishop and Preserving Appellate Review of SBM Orders

The defendant in *Bishop* was convicted at trial of indecent liberties at trial and immediately after trial pleaded guilty to additional counts of indecent liberties involving another victim. The court found the defendant to be a recidivist and ordered lifetime SBM. It appears that no *Grady* hearing was conducted. No constitutional objection was made when the trial court entered the SBM order, and notice of appeal from that order was not filed in a timely manner. The defendant asked the court of appeals to grant his cert. petition to review the SBM order and further to invoke Rule 2 to review his unpreserved constitutional argument against SBM on *Grady* grounds. The court of appeals declined both requests.

The court noted that before the court's decisions in *Morris* and *Blue*, it was only fair to provide parties a chance to argue reasonableness under *Grady*, and the court was willing to take extraordinary steps to allow review and remand. The defendants in the cases cited above did not have the benefit of the *Morris* and *Blue* decisions at the time of their SBM hearings. In the *Bishop* case, however, "The law governing the preservation of this issue was settled at the time Bishop appeared before the trial court." Slip Op. at 5. Finding no other argument justifying the use of its discretionary review powers, the court dismissed the appeal for lack of jurisdiction, and the lifetime SBM order stands.

This isn't the first time that the court of appeals has declined to invoke its discretion on this issue. *See State v. Martin*, 797 S.E.2d 708 (2017) (unpublished) (granting cert. but refusing to use Rule 2 to consider constitutional challenge to SBM not raised at trial level in the ineffective-assistance context). But, *Bishop* does seem to be a departure from what has generally been a more lenient attitude toward defective notices of appeal and unpreserved constitutional arguments concerning SBM. If *Bishop* is any indication, the failure of defense counsel to object on *Grady* grounds may result in waiver of the issue on appeal. Likewise, the failure of defense counsel to provide proper and timely notice of appeal of SBM orders (with or without a *Grady* objection at the time) may result in waiver of appellate review of SBM orders.

State v. Greene and the State's Burden

When *Grady* hearings are being held at the trial court level, prosecutors are sometimes failing to present any formal evidence at all or are presenting insufficient evidence of the reasonableness of SBM. Remands for new hearings were allowed in *Morris*, *Blue*, *Modlin*, and *Simmons*, among others. In this way, the State too has been given something of a grace period to figure out how *Grady* hearings should be conducted: When the State has failed to present evidence of reasonableness supporting the SBM order, they have often gotten a second chance on remand to try and meet their burden. *State v. Greene* indicates that such grace period for the State is also now over.

In *Greene*, the defendant qualified as a recidivist, and the trial court held an SBM hearing. At the hearing, the State called a clerk to attest to the defendant's prior reportable conviction. No other witnesses were called to testify, and no evidence of the details of the SBM program or the State's interest was offered. The defendant filed a motion to dismiss the State's application for SBM before the hearing, citing *Grady*, *Morris,* and *Blue*. After the close of evidence and hearing arguments of the parties, the trial court denied the defendant's motion to dismiss and granted the State's request for lifetime SBM. The trial court made the specific finding that the defendant's privacy rights were outweighed by the State's interest in protecting the community, given the defendant's repeated offenses of sexual misconduct. Slip op. at 3.

On appeal, the State conceded that the hearing was insufficient to comport with the mandate of *Grady*, *Morris*, and *Blue*, but it asked to have the matter remanded to the trial court for a new hearing. The defendant opposed a remand and asked to have the SBM order reversed. Thus, the question before the court was the appropriate remedy in situations where the State, having the benefit of *Morris* and *Blue*, fails to meet its burden at an SBM hearing. The court seemed to view this question as a straightforward issue of civil procedure. Under Rule 41(b) of the N.C. Rules of Civil Procedure, the defendant may move for dismissal where the plaintiff's evidence doesn't show a right to relief. Rule 41(b) goes on to provide, "Unless the court in its order for dismissal otherwise specifies, a dismissal under this section . . . operates as an adjudication on the merits." The court of appeals in *Greene* treated the defendant's motion to dismiss as a motion for dismissal under Rule 41(b) and stated:

Because dismissal under Rule 41(b) is to be granted if the plaintiff has shown no right to relief, having conceded the trial court's error, the State must likewise concede that the proper outcome below would have been for the trial court to grant the defendant's motion and dismiss the satellite-based monitoring proceeding against him. Slip op. at 6-7 (internal citations omitted).

The court stated further, "The State cites no authority suggesting that it would be been permitted to 'try again' by applying for yet another satellite-based monitoring hearing against the defendant, in hopes of this time having gathered enough evidence. Instead, the result of the trial court's dismissal would have been just that—a dismissal, and it is the duty of this Court to effectuate that result." Slip op. at 7. Accordingly, the court reversed the denial of the defendant's motion to dismiss, vacating the SBM order and expressly refusing the State's request for a remand.

Greene means that prosecutors may normally only get one bite at the SBM apple moving forward. It seems unlikely that, at least without unusual facts, the appellate division will continue with the near-automatic remands for new hearings on SBM that were granted in previous cases. Just as defense lawyers are now expected to know *Grady* and the civil nature of SBM orders at this stage, prosecutors are expected to understand their burden at a *Grady* hearing.

There are still quite a few unanswered questions in the area of SBM and *Grady* hearings, and we are almost sure to get more guidance as more hearings are conducted and orders are appealed. But for now, attorneys handling these hearings need to beware of the implications of *Bishop* and *Greene* and prepare accordingly.

P.S. In the interest of full disclosure, I was trial counsel for the defendant in *Greene* at his SBM hearing.