More Satellite-Based Monitoring Cases, Another Dissent

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It seems like every batch of new opinions from the court of appeals includes at least one case on satellite-based monitoring (SBM) of sex offenders. Yesterday's batch had two.

State v. Morrow involved a defendant convicted of indecent liberties with children in November of 2006. He was sentenced to probation, which was ultimately revoked in early 2008. After revoking Mr. Morrow's probation, the court held an SBM determination hearing (a bring-back hearing) at which it determined that Mr. Morrow had committed an offense involving the "mental, physical, or sexual abuse of a minor" and that he required the "highest possible level of supervision and monitoring," notwithstanding the fact that DOC's Static-99 risk assessment rated him a "moderate" risk. The court ordered him to enroll in SBM for a period of "seven to ten years."

The defendant first argued that SBM violates the Ex Post Facto Clause by increasing the punishment for his crime after it was committed. Citing to *State v. Bare*, the court rejected this argument, although it once again noted (as it did in *Bare* and *State v. Wagoner*) that the record lacked evidence about the actual nature of the program as applied to the defendant.

After declining to rule on Mr. Morrow's void for vagueness argument because it was not raised in the trial court, the court next considered the defendant's argument that the SBM hearing procedure violates due process by failing to give the defendant notice of precisely what evidence will come into play at the hearing. The court dismissed the argument in *Morrow*, but dealt with it more squarely in *State v. Stines*, which I'll write about in a later post because this one will be too long as it is.

Next, Mr. Morrow challenged the trial court's determination that he required the "highest possible level of supervision and monitoring," arguing that a defendant *must* score "high risk" on DOC's Static-99 as a prerequisite to monitoring, and he scored only "moderate." The court disagreed. After concluding in *State v. Kilby* and *State v. Causby* that a moderate risk assessment, without more, could not support a finding that a defendant required monitoring, the court affirmatively stated in *Morrow* that "any proffered and otherwise admissible evidence relevant to the risk posed by a defendant should be heard by the trial court; the trial court is not limited to the DOC's risk assessment." (The court's citation to G.S. 8C-1, Rule 402 of the rules of evidence, reinforces my belief that the rules apply at SBM determination hearings.)

Despite rejecting Mr. Morrow's reading of the statute, the court concluded that the evidence the State presented to prove the defendant's riskiness-that he was 11 or 12 years older than the victim-was insufficient to support the court's conclusion that he required the highest possible level of supervision and monitoring. But it was *something*, and enough to justify a remand to the trial court to consider evidence and make additional findings. The court gave a strong hint that Mr. Morrow's failure to attend at least seven sessions of sexual abuse treatment (evidence that was presented at his probation violation hearing but not at his SBM hearing) was just the kind of thing that could support a finding of high risk.

Finally, the court noted that the trial court erred by ordering an indeterminate ("seven to ten years") period of monitoring. Because there is no provision for non-lifetime enrollees to petition for removal from monitoring (G.S.

14-208.43(e) *prevents* the Post-Release Supervision and Parole Commission from considering non-lifetime cases), the court concluded that G.S. 14-208.40B requires the trial court to set a definite time period for a defendant's enrollment in SBM.

Judge Elmore dissented, just as he did in *Wagoner*, on the ex post facto issue. Again taking judicial notice of the Department of Correction's Interim Policy on Sex Offender Management, Judge Elmore wrote that he had enough information to conclude that SBM is punishment. (The majority declined to take judicial notice of the Department of Correction's Interim Policy on Sex Offender Management to fill in the informational gaps, pointing out that neither the defendant nor the State mentioned the policy at trial or in their appellate briefs. It did, however, acknowledge that DOC is required to have a policy on SBM management, and that G.S. 143B-261.1 requires them to file it with the Attorney General, notwithstanding their exemption from the Administrative Procedure Act under G.S. 150B-1. If you want to learn more about DOC's exemption from the APA and other issues in the administrative rule-making process, my colleague Richard Whisnant wrote the book on it. Literally.) The dissent's analysis of the seven-factor test from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), is virtually identical to the same analysis in *Wagoner*. You can read my earlier discussion of it here.