Satellite-Based Monitoring Is not Punishment

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I was out of the office when the Supreme Court of North Carolina released its latest batch of opinions, so I'm just now getting around to writing about big news related to satellite-based monitoring (SBM) of sex offenders. In *State v. Bowditch*, the state high court concluded that SBM is not a criminal punishment, and thus does not implicate constitutional prohibitions against ex post facto laws.

Bowditch was a consolidated case involving three defendants whose crimes occurred before the SBM regime was enacted into law in 2006. At their G.S. 14-208.40B SBM determination hearing, the defendants developed an extensive factual record on various aspects of the monitoring regime, including the size and recharging period of the tracking devices enrollees must wear, the way the devices transmit information and alerts to DOC, and the various ways in which the program impacts an enrollee's daily life. Based on that record, the defendants successfully persuaded the trial court that SBM is punitive—and thus an unconstitutional ex post facto punishment as applied to them. After the State appealed, the supreme court granted the defendants' petition for discretionary review, bypassing the court of appeals.

The supreme court reversed. Using the "intent-effects" framework the United States Supreme Court has used to analyze other ex post facto challenges, *see* Smith v. Doe, 538 U.S. 84 (2003) (holding Alaska's sex offender registration law to be nonpunitive), the court determined that the General Assembly did not *intend* for SBM to punish offenders, and that the regime was no so punitive in *effect* as to negate the legislature's intent. Justice Brady wrote for a four-justice majority.

Regarding the legislature's intent, the court concluded that the SBM law's placement in Chapter 14 of the General Statues (the criminal law chapter) and its choice of DOC (the agency primarily responsible for criminal punishment) to oversee the program were not dispositive indicators of the legislative objective behind SBM. To the contrary, the court noted that the SBM law was placed in the same statutory article as the sex offender registration law—a regime already deemed civil by North Carolina's appellate courts, State v. Sakobie, 165 N.C. App. 447 (2004)—and that it made sense from an "organizational and fiscal" standpoint for DOC to run the program.

The court proceeded to analyze whether, despite the legislature's civil intent, the law is punitive in effect. Applying the multi-factor analysis endorsed by the Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the court decided it is not. While acknowledging that the SBM device certainly has an impact on enrollees' lives, the court concluded that it was less harsh than restraints such as occupational debarment, license revocation, and—perhaps most convincingly—involuntary commitment, each of which has been deemed nonpunitive by the United States Supreme Court. *See* De Veau v. Braisted, 363 U.S. 144 (1960) (forbidding work as a union official); Hawker v. New York, 170 U.S. 189 (1898) (revoking a medical license); and Kansas v. Hendricks, 521 U.S. 346 (1997) (civil commitment of sex offenders). Enrollees' limited ability to swim, scuba dive, and travel by air are not trivial, the court said, but "no aspect of the SBM program remotely approaches the same level of restraint as the detainment inherent in the civil commitment scheme upheld in *Hendricks*."

The majority likewise rejected the defendants' argument that SBM is no different than electronic house arrest (an intermediate punishment under Structured Sentencing), noting that the monitoring component of the SBM law is "more

passive" than EHA, and that DOC makes some effort to treat unsupervised SBM enrollees (that is, those whose period of probation, parole, or post-release supervision has ended) differently than those still under formal supervision. The requirement of 90-day visits by DOC officials to maintain the system did not, the court said, amount to an unnecessary burden on enrollees' Fourth Amendment rights because they, as convicted felons, have a diminished expectation of privacy. (I was unable through my own research to find many cases in support of the idea that once convicted of a felony, a person's Fourth Amendment rights are forever diminished. Two of the cases the court cites for this point involve felons who are still in prison or on probation, and thus still in the process of being punished.) The court also disagreed with the notion that the SBM equipment amounts to a scarlet-letter shaming sanction, saying a "casual observer could perceive the [equipment] to be any number of personal electronic devices."

Finally, the court concluded that the SBM law's nonpunitive purpose of "protecting the public" was not overwhelmed by the fact that the regime also promotes retribution and deterrence, two of the traditional aims of criminal punishment. This seems to me to be a very fine line; deterring crime and protecting the public are arguably two sides of the same coin in this context. In any event, the program as a whole was not deemed excessive in light of sex offenders' "widely documented" high rate of recidivism.

Justice Hudson authored a dissent, joined by the other two women on the court. She agreed that the legislature did not intend for SBM to be punitive, but concluded that the regime's "substantial interferences into the daily lives of those monitored are too punitive in effect to be imposed retroactively." She questioned the law's baseline effectiveness and the underlying premise that sex offender recidivism rates are especially high, noting in a footnote that DOC's own sex offender specialist calls this notion a "myth." In response to the majority's reliance on *Hendricks*, Justice Hudson noted that eligibility for civil commitment under the law at issue in that case was predicated on findings of mental abnormality separate from the underlying crime, whereas SBM is triggered solely on the basis of a prior conviction.

The dissent agreed with the defendant's argument that SBM shares more in common with electronic house arrest than with registration. By reference to a description of EHA in a 1997 School of Government publication (*Law of Sentencing, Probation, and Parole in North Carolina* by Stevens Clarke), Justice Hudson pointed out that SBM and EHA are nearly functional equivalents. If anything, that argument could be made more forcefully: DOC no longer uses the telephone-based EHA system described in Steve's book, but rather uses the very same GPS technology for EHA and SBM. (Somebody really ought to update that book!) And unlike information published on the sex offender registry, information gathered through the SBM is *not* made available to the general public in a way that allows the public to avoid high-risk offenders, calling into question the law's purportedly primary focus on public safety.

So, after nearly a dozen court of appeals cases saying so, we now know that SBM is not punishment. The court also decided a number of other cases alongside *Bowditch*, affirming the court of appeals each time by the same 4–3 split. I'll write another post summing up the various issues resolved by those cases.