SBM Is an Unreasonable Search in Grady's Case

Author : Jamie Markham

Categories : Sentencing, Uncategorized

Tagged as : grady v. north carolina, satellite based monitoring, sbm, sex offenders

Date : May 18, 2018

In Grady v. North Carolina, 135 S. Ct. 1368 (2015), the Supreme Court held that North Carolina's satellite-based monitoring regime for sex offenders is a search, but left it to North Carolina's courts to decide whether it is an unreasonable search in violation of the Fourth Amendment. We got an answer for one defendant this week, as Torrey Grady's case circled back through the court of appeals.

Phil and I have written about *Grady* a lot, so I won't go through a full recap of the facts. Torrey Grady is a recidivist sex offender who was ordered to enroll in lifetime SBM in 2013. He appealed to the court of appeals, arguing that SBM violated his Fourth Amendment right to be free from unreasonable searches. The court of appeals rejected the argument on the theory that SBM was part of the civil regulatory scheme. The Supreme Court of the United States eventually granted certiorari and reversed, noting that civil regimes, too, can include searches within the meaning of the Fourth Amendment. The Court remanded the case to North Carolina for a determination of whether, given the "totality of the circumstances, including the nature and purpose of the search and the extent to which [it] intrudes upon reasonable privacy expectations," SBM is a reasonable search. *Grady*, 135 S. Ct. at 1371.

We know from cases decided after *Grady* that the State bears the burden of proving that SBM is reasonable under the Fourth Amendment. State v. Blue, __ N.C. App. __, 783 S.E.2d 524 (2016). In most of the cases decided since *Grady*, the State has failed to meet that burden—mostly because it failed to put on any evidence at all.

Torrey Grady's case was a little different. When the matter was remanded to New Hanover County, the State called a probation supervisor to testify about the SBM program, presented information about the device, and offered evidence about Grady's prior record. The trial court concluded that SBM was reasonable and thus constitutional.

A divided court of appeals reversed, concluding that the search was unreasonable as applied to this defendant. The court applied a "general Fourth Amendment approach" similar to that used by the Supreme Court to uphold warrantless searches of probationers and parolees, mainly on the theory that they have a diminished expectation of privacy in light of their supervision. *See* United States v. Knights, 534 U.S. 112 (2001) (probationers); Samson v. California, 547 U.S. 843 (2006) (parolees). Though Grady was no longer on probation or post-release supervision, the court concluded that his status as a registrant nonetheless diminished his expectation of privacy as compared to non-registrant citizens. Slip op. at 11.

Still, the evidence presented in the trial court came up short. The testimony from the probation officer gave a lot of information about the "nature and purpose of the search" (for example, the dimensions and technical capabilities of the tracking device), but didn't shed much light on the extent to which the device intruded on a reasonable expectation of privacy. The officer's testimony also failed to explain how the SBM program works for unsupervised offenders like Grady, who are managed from Raleigh, not by field officers like the one who testified. Additionally, the State offered no evidence aside from Grady's criminal history to establish his present risk of reoffending. Finally, the State didn't provide any background about the efficacy of the SBM program, which would have been helpful in supporting the State's-interest side of the balancing test. In the absence of evidence along those lines, the court of appeals concluded SBM is an unreasonable search as applied to Grady.

This blog post is published and posted online by the School of Government to address issues of interest to government officials. This blog post is for educational and informational Copyright © 2009 to present School of Government at the University of North Carolina. All rights reserved. use and may be used for those purposes without permission by providing acknowledgment of its source. Use of this blog post for commercial purposes is prohibited. To browse a complete catalog of School of Government publications, please visit the School's website at www.sog.unc.edu or contact the Bookstore, School of Government, CB# 3330 Knapp-Sanders Building, UNC Chapel Hill, Chapel Hill, NC 27599-3330; e-mail sales@sog.unc.edu; telephone 919-966-4119; or fax 919-962-2707.

Judge Bryant dissented, saying the reasonableness bar “is not so high as the majority has set forth.” She would have found the search reasonable as applied to Grady.

There have now been about a dozen reported post-*Grady* cases in North Carolina, including Grady’s own case on remand, and we’ve yet to have one with evidence sufficient to establish the reasonableness of SBM. A nationwide search isn’t much more helpful for the State. (An exception may be Doe v. Coupe, 143 A.3d 1266 (Del. Ch. 2016), in which the court walks through a detailed discussion of the balancing test to uphold Delaware’s GPS monitoring regime.) And if the process was difficult for a defendant like Grady who was already out of prison and due to wear the device, I can only imagine how hard it will be for a defendant who is headed to prison. In those cases, the trial court is tasked with analyzing the reasonableness of a search that might not begin for years or even decades. The latest chapter in Grady’s case gives some additional guidance on how a court might do that, but it is by no means a clear roadmap.

This blog post is published and posted online by the School of Government to address issues of interest to government officials. This blog post is for educational and informational Copyright © 2009 to present School of Government at the University of North Carolina. All rights reserved. use and may be used for those purposes without permission by providing acknowledgment of its source. Use of this blog post for commercial purposes is prohibited. To browse a complete catalog of School of Government publications, please visit the School’s website at www.sog.unc.edu or contact the Bookstore, School of Government, CB# 3330 Knapp-Sanders Building, UNC Chapel Hill, Chapel Hill, NC 27599-3330; e-mail sales@sog.unc.edu; telephone 919-966-4119; or fax 919-962-2707.