

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-460
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v.

Robeson County
No. 04 CRS 52500

DONALD LEE BURGESS,
Defendant.

Appeal by defendant from order entered 8 December 2010 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 10 October 2011.

Roy Cooper, Attorney General, by Thomas J. Pitman, Special Deputy Attorney General, for the State.

Edward Eldred, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Donald Lee Burgess entered pleas of guilty to charges of second-degree rape and felony breaking and entering on 30 March 2005. He was sentenced to an active prison term of 70-93 months, and was released from prison on 1 February 2010.

On 22 July 2010, defendant was personally served with a letter from the North Carolina Department of Correction ("Department") informing him of its initial determination that,

based on his conviction for second-degree rape, an aggravated offense, defendant met the criteria set out in N.C.G.S. § 14-208.40(a), requiring his enrollment in satellite-based monitoring ("SBM"). The letter notified defendant to appear for a Satellite Based Monitoring Determination Hearing ("SBM hearing") in the Robeson County Superior Court on 7 September 2010.

Defendant appeared at the appointed date and time and sought assigned counsel. Counsel was assigned and the hearing was continued for approximately sixty days. At the SBM hearing on 8 December 2010, defendant argued that requiring him to enroll in lifetime SBM violated his federal and North Carolina constitutional rights, including the 8th Amendment ban on cruel and unusual punishment and the prohibition on ex post facto punishment. The trial court ordered defendant to enroll in lifetime SBM. Defendant appeals.

On appeal, defendant contends the superior court lacked subject matter jurisdiction to conduct the SBM hearing because the State failed to comply with the statutory procedure to initiate the hearing when it gave him notice of the hearing by personal service rather than by certified mail, as specified in

the statute. Defendant also contends lifetime SBM violates his constitutional guarantees against ex post facto and cruel and unusual punishment. We reject both arguments.

N.C.G.S. § 14-208.40B(b) provides:

If the Department determines that the offender falls into one of the categories described in G.S. 14-208.40(a) The Department shall notify the offender of the Department's determination and the date of the scheduled hearing by certified mail sent to the address provided by the offender pursuant to G.S. 14-208.7. The hearing shall be scheduled no sooner than 15 days from the date the notification is mailed.

N.C. Gen. Stat. § 14-208.40B(b) (2009). "[T]he notice provisions found in [N.C.G.S. § 14-208.40B(b)] are merely that, notice provisions to protect the due process rights of offenders who are not currently incarcerated." *State v. Wooten*, 194 N.C. App. 524, 528, 669 S.E.2d 749, 751 (2008), *disc. review denied and cert. dismissed*, 363 N.C. 138, 676 S.E.2d 308 (2009). Personal service of notice containing the proper information, effectuated more than fifteen days before the scheduled hearing, has been upheld as complying with N.C.G.S. § 14-208.40B(b). See *State v. Morrow*, 200 N.C. App. 123, 128, 683 S.E.2d 754, 758-59 (2009). Proper notice for a SBM hearing includes the hearing date and the Department's determination as to why the offender is eligible for SBM. See *State v. Stines*, 200 N.C. App. 193,

199, 683 S.E.2d 411, 415 (2009). The subject matter jurisdiction of the superior courts to conduct SBM hearings is established by N.C.G.S. § 14-208.40B(b).

Defendant does not dispute that he received the letter informing him of the date of the SBM hearing, which he signed and dated, more than fifteen days before the SBM hearing, nor does he dispute that the letter indicated the basis for the Department's determination that he was eligible for SBM. Instead, defendant simply argues, relying on *Stines*, that the Department's action in providing him notice by personal service rather than by certified mail is not in compliance with the procedures prescribed by N.C.G.S. § 14-208.40B(b) and deprives the superior court of subject matter jurisdiction. See *Stines*, 200 N.C. App. at 204, 683 S.E.2d at 418.

In *Stines*, we reversed and remanded the order for SBM due to the Department's failure to specify, in its notice, the basis for its initial determination that he was eligible for mandatory SBM, in violation of defendant's procedural due process rights. *Id.* In the instant case, however, defendant does not dispute that he received actual timely notice of the Department's determination and the SBM hearing, and that the notice complied with the statute in every respect other than the manner of its

delivery. Thus, we conclude defendant's due process rights were not violated and we reject his argument to the contrary. See *Morrow*, 200 N.C. App. at 128, 683 S.E.2d at 758-59.

Defendant further contends the imposition of SBM violates his federal and North Carolina constitutional rights against ex post facto and cruel and unusual punishment. Defendant concedes, however, that we are bound by our own holdings as well as the holdings of the North Carolina Supreme Court with regard to these issues. The North Carolina Supreme Court has held SBM does not violate the federal or state constitutional prohibition against ex post facto punishment. *State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010). Our courts have also held SBM does not constitute criminal punishment; rather, it is a civil regulatory scheme. See, e.g., *id.* at 352, 700 S.E.2d at 13; *State v. Bare*, 197 N.C. App. 461, 478, 677 S.E.2d 518, 531 (2009). Thus, we overrule defendant's constitutional arguments.

Affirmed.

Judges GEER and STROUD concur.

Report per Rule 30(e).