

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-624
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v.

Pitt County
No. 05 CRS 18750

BILLY RAY KEEL

Appeal by defendant from order entered 10 February 2011 by Judge W. Russell Duke Jr., in Pitt County Superior Court. Heard in the Court of Appeals 8 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly Grande, for the State.

Daniel F. Read, for defendant-appellant.

CALABRIA, Judge.

Billy Ray Keel ("defendant") appeals the trial court's order requiring him to enroll in satellite-based monitoring ("SBM") for the remainder of his natural life. We affirm.

I. Background

On 22 April 1991, defendant was convicted of the offense of second degree rape. On 19 June 2006, defendant pled guilty to the offense of taking indecent liberties with a minor.

Defendant pled guilty pursuant to a plea agreement with the State in exchange for the State's dismissal of three other charges: first degree kidnapping, first degree statutory sex offense, and failure to register as a sex offender.

On 17 July 2006, the trial court sentenced defendant to an active term of imprisonment of a minimum of 25 months to a maximum of 30 months in the North Carolina Department of Correction ("NCDOC"). Defendant was released from NCDOC on or about 15 August 2008. NCDOC then notified defendant, pursuant to N.C. Gen. Stat. § 14-208.40B(b), that he would be subject to an SBM determination hearing. After a hearing on 10 February 2011, the trial court ordered defendant to enroll in SBM for the remainder of his natural life. Defendant appeals.

II. Findings Supporting Lifetime SBM

Defendant argues that the trial court erred by ordering him to enroll in lifetime SBM. Specifically, defendant contends that the trial court erroneously found that defendant was a recidivist and that he was convicted of an aggravated offense. We disagree.

This Court stated the standard of review for orders as to SBM in *State v. Kilby*: "[w]e review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal

accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.”

State v. Singleton, 201 N.C. App. 620, 626, 689 S.E.2d 562, 566 (quoting *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009)), *disc. review allowed*, 364 N.C. 131, 696 S.E.2d 697 and *disc. review improvidently allowed*, 364 N.C. 418, 700 S.E.2d 226 (2010).

Since there was no SBM determination at the time defendant was sentenced in 2006, the instant case is governed by N.C. Gen. Stat. § 14-208.40B (2009). See *Kilby*, 198 N.C. App. at 367, 679 S.E.2d at 432-33. This statute provides, in relevant part:

If the court finds that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, or (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, the court shall order the offender to enroll in satellite-based monitoring for life.

N.C. Gen. Stat. § 14-208.40B (c) (2009). In the instant case, defendant was found both to be a recidivist and to have been convicted of an aggravated offense. As indicated by the statute, either finding, standing alone, requires the trial court to order a defendant to enroll in lifetime SBM.

A. Recidivist

N.C. Gen. Stat. § 14-208.6(2b) defines a recidivist as "a person who has a prior conviction for an offense that is described in G.S. 14-208.6(4)." N.C. Gen. Stat. § 14-208.6(4)(a), in turn, provides that a reportable conviction includes a final conviction of a sexually violent offense. Finally, N.C. Gen. Stat. § 14-208.6(5) defines a sexually violent offense to include "a violation of . . . G.S. 14-27.3 (second degree rape)." There is no dispute that defendant was convicted of the offense of second degree rape on 22 April 1991. As a result, defendant clearly falls within the statutory definition of a "recidivist."

Nonetheless, defendant contends that he does not meet what defendant refers to as the "common definition" of the term recidivist, citing a dictionary definition of the term. Specifically, defendant notes that more than twenty years had passed between the time of his second degree rape conviction and the SBM hearing, and he argues that it would be inappropriate to count a conviction of that age in the recidivist determination. Defendant relies primarily on *Britt v. State*, 363 N.C. 546, 681 S.E.2d 320 (2009), to support his argument. In *Britt*, our Supreme Court held that a recent amendment to the Felony Firearms Act, which stripped the plaintiff of his right to keep

and bear arms after he had been responsibly exercising that right for seventeen years, was an unreasonable and unconstitutional regulation as applied to that plaintiff. *Id.* at 550, 681 S.E.2d at 323. However, the *Britt* case dealt solely with the reasonableness of the amended Felony Firearms Act under Article I, Section 30 of the North Carolina Constitution and did not involve any issues of statutory construction. Thus, its reasoning is not applicable to defendant's statutory argument.

Indeed, defendant's statutory argument is wholly inconsistent with our Supreme Court's relevant rules of statutory construction. "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (internal quotations and citation omitted). The SBM statutes do not contain any provision which would permit the trial court to ignore prior convictions of a certain age and such a limitation cannot be judicially imposed. Since a second degree rape conviction is specifically listed as a conviction which qualifies a defendant as a recidivist under the SBM statutes,

the trial court correctly determined that defendant was a recidivist as defined by N.C. Gen. Stat. § 14-208.6(2b). Defendant's argument is overruled.

B. Aggravated Offense

Since the recidivist finding alone required the trial court to enter its lifetime SBM order, we do not address in detail defendant's argument regarding the trial court's aggravated offense finding. However, we note that the State concedes, and we agree, that the trial court erred by making this finding, as the offense of indecent liberties is not an aggravated offense under the SBM statutes. *See State v. Davison*, 201 N.C. App. 354, 361, 689 S.E.2d 510, 515 (2009).

III. *Ex Post Facto* and Double Jeopardy

Finally, defendant argues that the imposition of lifetime SBM constitutes an unconstitutional *ex post facto* punishment and violates his constitutional protection against double jeopardy. As defendant concedes, our Supreme Court has previously rejected this precise argument. *See State v. Bowditch*, 364 N.C. 335, 700 S.E.2d 1 (2010) (holding that the SBM program is a civil regulatory scheme that does not implicate constitutional protections against *ex post facto* laws or double jeopardy). Since this Court is bound by *Bowditch*, defendant's argument must

be overruled.

IV. Conclusion

The evidence presented at the SBM hearing supported the trial court's finding that defendant met the statutory definition of a recidivist. Consequently, the trial court correctly ordered defendant to enroll in SBM for the remainder of his natural life. The trial court's order is affirmed.

Affirmed.

Judges McGEE and HUNTER, Robert C. concur.

Report per Rule 30(e).