IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1251

Filed: 21 June 2016

Craven County, No. 09 CRS 51204

STATE OF NORTH CAROLINA

v.

WILLIAM BURNETT LINDSEY

Appeal from order entered 14 July 2015 by Judge Arnold O. Jones, II in Craven County Superior Court. Heard in the Court of Appeals 1 June 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Irons & Irons, PA, by Ben G. Irons, II, for defendant-appellant.

ZACHARY, Judge.

Defendant appeals from an order of the trial court requiring him to enroll in North Carolina's sex offender satellite-based monitoring ("SBM") program. *See State v. Singleton*, 201 N.C. App. 620, 626, 689 S.E.2d 562, 566 (2010) ("hold[ing] that this Court has jurisdiction to consider appeals from SBM monitoring determinations under N.C. Gen. Stat. § 14-208.40B pursuant to N.C. Gen. Stat. § 7A-27"). Because the trial court failed to make the statutorily-required finding that defendant

"requires the highest possible level of supervision and monitoring[,]" N.C. Gen. Stat. § 15A-208.40B(c) (2015), we remand for further proceedings.

I. Factual and Procedural Background

On 15 June 2009, defendant entered a guilty plea to taking indecent liberties with a child and was sentenced to fifteen to eighteen months' imprisonment, as provided in his plea arrangement. The trial court ordered defendant to register as a sex offender within seventy-two hours of his release from prison. *See* N.C. Gen. Stat. § 14-208.7(a) (2015). Finding that defendant's offense "did involve the physical, mental, or sexual abuse of a minor," the court further ordered the Department of Corrections to perform "a risk assessment to determine if defendant shall be assigned to satellite based monitoring upon release."[1] *See* N.C. Gen. Stat. § 14-208.40(a)(2) (2015) (defining eligibility for the satellite-based monitoring program).

A Division of Adult Corrections ("DAC") probation officer administered a Revised STATIC-99 risk assessment on 16 June 2015, which placed defendant in the "High" risk category. The trial court held a "bring-back hearing" on 14 July 2015 to determine defendant's eligibility for satellite-based monitoring. *See* N.C. Gen. Stat.

[1] We note that the trial court erroneously found defendant's conviction for taking indecent liberties with a child to be "an offense against a minor" under N.C. Gen. Stat. § 14-208.6(1m) (2015). However, because indecent liberties is a "sexually violent offense" under N.C. Gen. Stat. § 14-208.6(5) (2015), it is still grounds for imposition of satellite-based monitoring, assuming all other requirements are met. *See State v. Thomas*, 225 N.C. App. 631, 635, 741 S.E.2d 384, 387 (2013); *see also* N.C. Gen. Stat. § 14-208.6(4)(a) (2015) (defining "[r]eportable conviction" to include any "sexually violent offense").

§ 14-208.40B(b) (2015); *see also State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 433 (2009) ("This case is controlled by N.C. Gen. Stat. § 14-208.40B as a SBM determination was not made when defendant was sentenced"). After reviewing the STATIC-99 form and hearing from the parties, the court ordered defendant to enroll in the satellite-based monitoring program for a period of ten years.

II. Argument

In his sole argument on appeal, defendant claims that the trial court erred by ordering him to enroll in the satellite-based monitoring program without making a determination that he "requires the highest possible level of supervision and monitoring" in accordance with N.C. Gen. Stat. § 14-208.40B(c). The State concedes that the trial court failed to make the necessary finding and asks that the court's order be "vacated and remanded for a new SBM determination hearing."

Based on his conviction for taking indecent liberties and the findings made by the trial court on 15 June 2009, defendant is required to register as a sex offender for a reportable conviction that involved the physical, mental, or sexual abuse of a minor. *See* N.C. Gen. Stat. §§ 14-208.6(4)(a), (5), 14-208.7(a). Accordingly, he is eligible for the satellite-based monitoring program if he is found to "require[] the highest possible level of supervision and monitoring." N.C. Gen. Stat. § 14-208.40(a)(2) (2015). Under these circumstances, the following statutory procedure applies for determining defendant's satellite-based monitoring program eligibility:

> Upon receipt of a risk assessment from the Division of Adult Correction, the court shall determine whether, based on the Division of Adult Correction's risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.

N.C. Gen. Stat. § 14-208.40B(c) (2015); *see also* N.C. Gen. Stat. §§ 14-208.40A(e) (2015).

When conducting a bring-back hearing under N.C. Gen. Stat. § 14-208.40B(c), the trial court is not bound by the DAC's risk assessment when assessing whether a defendant requires the highest possible level of supervision and monitoring. *See State v. Morrow*, 200 N.C. App. 123, 131-32, 683 S.E.2d 754, 761 (2009) ("declin[ing] to adopt defendant's proposed construction of the statute that would requires [sic] a D[A]C rating of high risk as a necessary prerequisite to SBM"), *aff'd per curiam on other grounds*, 364 N.C. 424, 700 S.E.2d 224 (2010). Rather, the statute "places override authority with the trial court" to make an independent, judicial determination of a defendant's need for satellite-based monitoring based on the totality of the evidence before the court. *Id.*

This Court has repeatedly recognized the trial court's authority to impose satellite-based monitoring, notwithstanding a risk assessment by DAC rating a defendant as only a "low" or "moderate" risk for reoffending. *See State v. Thomas*,

225 N.C. App. 631, 634, 741 S.E.2d 384, 387 (2013); *Kilby*, 198 N.C. App. at 370, 679 S.E.2d at 434; *State v. Causby*, 200 N.C. App. 113, 116-17, 683 S.E.2d 262, 264 (2009). However, where DAC finds the defendant to present "only a low or moderate risk of reoffending, the State must offer additional evidence, and the trial court make additional findings," to support a determination that the defendant requires "the highest possible level of supervision" justifying his enrollment in the satellite-based monitoring program. *Thomas*, 225 N.C. App. at 634, 741 S.E.2d at 387; *accord State v. Green*, 211 N.C. App. 599, 601, 710 S.E.2d 292, 294 (2011). Implicit in these prior decisions is the assumption that a DAC risk assessment classifying a defendant as "high" risk is sufficient, standing alone, to support a trial court's decision to place a defendant on satellite-based monitoring. Nonetheless, in light of our holding in *Morrow* that a judicial determination is necessary, *Morrow*, 200 N.C. App. at 131-32, 683 S.E.2d at 761, we conclude that a DAC risk assessment of "high" does not obviate the need for the trial court to make the requisite finding that the defendant "require[s] the highest possible level of supervision and monitoring" when the court imposes a terminal period[2] of satellite-based monitoring under N.C. Gen. Stat. §§ 14-208.40A(e) or 14-208.40B(c).

[2] Where a defendant is subject to lifetime satellite-based monitoring as a recidivist or sexually violent predator, or for committing an aggravated offense or a violation of N.C. Gen. Stat. §§ 14-27.23 or 14-27.28 (2015), no such determination is required. *See* N.C. Gen. Stat. §§ 14-208.40A(c), 14-208.40(e).

In the case *sub judice*, the trial court did not explicitly determine that defendant requires the highest possible level of supervision and monitoring. The transcript reflects the following statements by the court during the bring-back hearing:

> THE COURT: Okay. Well, I've reviewed the file and I have reviewed the revised Static-99 coding form, finding him to be a score of six, which puts him in the high range. Of course I'm sure, [counsel], you've told your client I can order anywhere from one day -- none, to one day, to the rest of his life on satellite-based monitoring. You understand that?
>
> [COUNSEL]: Yes, sir. We've talked about that judge, yes, sir.
>
> THE COURT: Has he gone to any counseling or anything like that? Or is he in ongoing counseling or anything like that?
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> [COUNSEL]: Not that I know of, Judge. . . .
>
> . . . .
>
> THE COURT: And he's 30 years old?
>
> [COUNSEL]: 30 years old, Judge. And [w]hat I can tell you about the case, if that would assist Your Honor, I think it was the victim in the underlying case was 15 years old or there around. I think he got charged 'cause she actually got pregnant. Turned out that it was not his child. But anyway, it resulted in a reduced – from a statutory rape charge, I believe, to this case. They had met at a club or something.
>
> THE COURT: Gonna order that he shall enroll in satellite-based monitoring for a period of 10 years. . . .

Moreover, the court did not mark a box in paragraph 4 of the "Findings" section on the AOC-CR-616 order form to indicate the basis for its decision to place defendant on satellite-based monitoring. Accordingly, we must vacate the order and remand for a determination by the court consistent with N.C. Gen. Stat. § 14-208.40B(c). *See Thomas*, 225 N.C. App. at 634-35, 741 S.E.2d at 387.

VACATED AND REMANDED.

Chief Judge McGEE and Judge McCULLOUGH concur.

Report per Rule 30(e).