NO. COA09-1509

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v. Nash County
Nos. 05 CRS 53809, 10

CHRISTOPHER GLENN WOOD

Appeal by Defendant from orders entered 26 January 2009 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 22 June 2010.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for the State

William D. Spence for Defendant.

BEASLEY, Judge.

Defendant appeals orders requiring his compliance with satellite based monitoring (hereinafter SBM) following service of an active sentence. We reverse.

On 1 November 2005 Defendant pled guilty to four counts of taking indecent liberties with a minor. The court sentenced Defendant to two consecutive terms of imprisonment of thirteen to sixteen months each. Defendant's service of these sentences ended on 7 March 2008. On 5 May 2008, Defendant filed an affidavit of indigency seeking the appointment of counsel to represent him in connection with the State's motion for SBM. The court appointed

counsel to represent Defendant and counsel appeared in court on Defendant's behalf on 26 January 2009. After hearing arguments of counsel, the trial court allowed the State's motion for SBM. The trial court entered two orders requiring Defendant to enroll in SBM for a period of ten years. From these orders Defendant appealed.

Defendant first argues that requiring him to enroll in SBM violates the protections against *ex post facto* punishment guaranteed by Article I, section 10(1) of the United States Constitution and Article I, section 16 of the North Carolina Constitution. He acknowledges that this argument was rejected by this Court in *State v. Bare*, ___ N.C. App. ___, 677 S.E.2d 518, 531 (2009), and *State v. Wagoner*, ____ N.C. App. ___, 683 S.E.2d 391, 400 (2009), but he requests the Court "to review, re-examine, and reconsider" these opinions. We decline. *See In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)("[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.").

Defendant's next series of contentions raise issues as to compliance with the procedural requirements of N.C. Gen. Stat. § 14-208.40B, which provided at the time Defendant was discharged from his sentence as follows:

> (a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), and there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring, the Department [of

Correction] shall make an initial determination on whether the offender falls into one of the categories described in G.S. 14-208.40(a).

(b) If the Department determines that the offender falls into one of the categories described in G.S. 14-208.40(a), the Department shall schedule a hearing in the court of the county in which the offender resides. 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. Receipt of notification shall be presumed to be the date indicated by the certified mail receipt.

(c) At the hearing, the court shall determine if the offender falls into one of the categories described in G.S. 14-208.40(a). The court shall hold the hearing and make findings of fact pursuant to G.S. 14-208.40A.

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, [or] (iii) the conviction offense was an aggravated offense, the court shall order the offender to enroll in satellite-based monitoring for life.

If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that offense is not an aggravated offense, and the offender is not a recidivist, the court shall order that the Department do a risk assessment of the offender. The Department shall have a minimum of 30 days, but not more than 60 days, to complete the risk assessment of the offender and report the results to the court. The Department may use a risk assessment of the offender done within six months of the date of the hearing.

Upon receipt of a risk assessment from the Department, the court shall determine whether, based on the Department'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 (2009).[1] Failure to comply with these procedures may result in the reversal of an order requiring an offender to enroll in SBM and a remand for a new hearing. *See State v. Stines*, __ N.C. App. __ , 683 S.E.2d 411 (2009)(reversing and remanding because the notice did not inform the defendant of the basis for the Department's determination).

Defendant does not contest the trial court's first finding of fact that Defendant was convicted of a reportable offense, but the trial court did not address whether the Defendant should be required to enroll in SBM. The trial court made the following contested findings of fact: (1) the Department of Correction (DOC) has made an initial determination that the offender falls into one of the categories requiring SBM; (2) the DOC scheduled a hearing in

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[1]Effective 1 December 2008, and applicable to offenses committed on or after that date, subsection (c) was amended by the addition of a clause (iv) providing "the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A" and substitution of "the offense is not an aggravated offense or a violation of G.S. 14-27.2A or G.S. 14-27.4A" for "offense is not an aggravated offense" in the third paragraph. 2008 N.C. Sess. Laws c. 117, s. 16.2

Effective 31 July 2009, subsection (b) was amended to substitute language providing "the district attorney, representing the Department, shall schedule a hearing in superior court for" in lieu of "the Department shall schedule a hearing in the court of," in the first sentence, and to add the last sentence concerning presumption as to receipt of the notice. 2009 N.C. Sess. Laws ch. 387, s. 4.

the county of Defendant's residence and provided the notice to the defendant as required by N.C. Gen. Stat. § 14-208.40B; and (3) Defendant falls into one of the categories requiring SBM in that

> the offense for which the defendant was convicted involved the physical, mental or sexual abuse of a minor, that the offense was not an aggravated offense or a violation of N.C. Gen. Stat. § 14-27.2A or N.C. Gen. Stat. § 14-27.4A, the defendant is not a recidivist, the Department of Correction has conducted a risk assessment of the defendant, and based on that assessment, the defendant requires the highest possible level of supervision and monitoring.

Defendant argues these contested findings are not supported by evidence in the record.

The record is devoid of documentation showing that the DOC made an initial determination that Defendant met conditions requiring SBM, that the DOC provided notice to Defendant as required by N.C. Gen. Stat. § 14-208.40B, or that the DOC conducted a risk assessment of Defendant. The State appropriately concedes that these findings are not supported by the evidence and that a new hearing is required.

We need not consider Defendant's remaining contentions. The orders requiring Defendant to enroll in SBM are

Reversed.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).