NO. COA09-1594

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v. Halifax County
No. 07 CRS 56621

ZYRL DEMONT SLEDGE

Appeal by Defendant from order entered 29 July 2009 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 22 June 2010.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Greene & Wilson, by Thomas Reston Wilson for Defendant.

BEASLEY, Judge.

Defendant appeals from an order requiring him to enroll in satellite-based monitoring pursuant to N.C. Gen. Stat. § 14-208.40B for the remainder of his natural life. For the following reasons, we reverse.

On 19 August 2008, Defendant pled guilty to one count of taking indecent liberties with a child. The trial court imposed an intermediate punishment of sixteen to twenty months imprisonment, suspended the sentence, and placed Defendant on supervised probation for 36 months. In its written judgment, the trial court did not make a finding that the offense was a reportable

conviction, but checked the box for "special conditions for reportable offenses" pursuant to N.C. Gen. Stat. § 15A-1343(b2). The trial court also ordered Defendant to register as a sex offender within 48 hours.

On 14 January 2009, the Division of Community Corrections of the Department of Correction wrote to Defendant notifying him to appear for a satellite-based monitoring (SBM) hearing. At the 29 July 2009 hearing, to support Defendant's enrollment in SBM, the State argued that he committed an aggravated offense as defined by N.C. Gen. Stat. § 14-208.6(1a). The prosecutor argued as follows:

> [T]here are indictments that charged [Defendant] with having vaginal intercourse while he was in a position of parent when that child would have been 11 years of age. And under 14-208.6, it would be an aggravated offense, because he engaged in a sexual act involving vaginal penetration of a victim who was less than 12 years old.

Defendant objected and argued that he was, in fact, convicted of taking indecent liberties with a child. The trial court responded, "[t]he charge itself is not what they are looking at. They are looking at the actual actions of the defendant in incurring the charge." After hearing further arguments from counsel, the trial court found and concluded as follows:

> [D]efendant falls into one of the categories requiring [SBM] under G.S. 14-208.40 in that the offense . . . was an aggravated offense in that the [D]efendant engaged in vaginal intercourse with a child under -- a child 11 years of age. Based on the foregoing findings of fact, the Court orders that the [D]efendant shall enroll in [SBM] under Article 27A of Chapter 14 of the General Statutes for the remainder of his natural life. That is the order.

By order filed 29 July 2009, the trial court found that Defendant had been convicted of an aggravated offense and ordered Defendant to enroll in SBM for the remainder of his natural life. Defendant appeals.

Defendant argues that the trial court erred in finding he was convicted of an aggravated offense and ordering him to enroll in SBM for the remainder of his natural life. Defendant first argues that this Court's holdings in *State v. Singleton* ___ N.C. App. ___, 689 S.E.2d 562 (2010), and *State v. Davison*, ___ N.C. App. ___, 689 S.E.2d 510 (2009), support his argument and, therefore, submits that the trial court's order should be reversed. We agree.

Our Court recently determined that

> [t]he General Assembly's repeated use of the term "conviction" compels us to conclude that, when making a determination pursuant to N.C.G.S. § 14-208.40A, the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction.

Davison, ___ N.C. App. at ___ , 689 S.E.2d at 517. The *Davison* Court concluded that "[a] conviction of indecent liberties requires none of the three factors required by the definition of an 'aggravated offense.'" *Id.* at __, 689 S.E.2d at 516. In *Singleton,* the defendant pled guilty to a charge of taking indecent liberties with a child pursuant to N.C. Gen. Stat. § 14-202.1. *Singleton,* __ N.C. App. at __, 689 S.E.2d at 563. After the trial court held a SBM determination hearing, the trial court entered an order finding that defendant was convicted of an aggravated offense and ordered the defendant to enroll in SBM for the remainder of his

natural life. Based upon our analysis in *Davison*, this Court held that the trial court erred in concluding that the defendant was convicted of an aggravated offense because "the offense of indecent liberties with a child does not fit within the definition of an 'aggravated offense' pursuant to N.C. Gen. Stat. § 14-208.6(la)." *Id.* at __, 689 S.E.2d at 569. This Court further held that the trial court erred in concluding that the defendant must be enrolled in SBM for the remainder of his natural life and reversed the trial court's order. *Id.* at ___, 689 S.E.2d at 568-69.

The State concedes that the trial court committed error under *Singleton* and *Davison* by determining that Defendant was convicted of an aggravated offense as defined by N.C. Gen. Stat. § 14-208.6(1a) and ordering him to enroll in SBM. Accordingly, we conclude the trial court's finding that Defendant was convicted of an aggravated offense and that he, therefore, was required to enroll in SBM for the rest of his natural life was, as a matter of law, error. The order requiring Defendant to enroll in SBM for the remainder of his natural life is therefore reversed.

Defendant also argues that the imposition of SBM violated his Constitutional rights against *ex post facto* laws and double jeopardy and violated his right to a trial by jury. Defendant, however, "acknowledges that this Court determined that SBM is a civil remedy, not a punishment, and thus has foreclosed many constitutional arguments." *See State v. Wagoner*, ___ N.C. App. ___, ___, 683 S.E.2d 391, 400 (2009) (holding that defendant's enrollment in SBM did not violate prohibitions against ex post

facto law or double jeopardy); and *State v. Bare,* ___ N.C. App. ___, ___, 677 S.E.2d 518, 531 (2009)(holding imposition of SBM does not violate prohibitions against *ex post facto* law). Defendant, nevertheless, argues that the dissenting opinions in *Bare* and *Wagoner* should be adopted. We are bound by prior opinions of this Court. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). We, therefore, decline to consider Defendant's arguments.

Reversed.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).