NO. COA09-1628

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

STATE OF NORTH CAROLINA

v. Alamance County
No. 08 CRS 57560-63

ELIJAH SHANE CLARY

Appeal by Defendant from judgments entered 27 August 2009 by Judge James E. Hardin, Jr., in Superior Court, Alamance County. Heard in the Court of Appeals 26 May 2010.

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

Kevin P. Bradley for Defendant.

McGEE, Judge.

Elijah Clary (Defendant) entered *Alford* pleas of guilty to one count of taking indecent liberties with a child, two counts of selling or delivering a controlled substance to a minor aged thirteen to sixteen, and two counts of dissemination of obscene material to a minor under the age of sixteen. As part of Defendant's *Alford* plea bargain, the State dismissed two counts of contributing to the delinquency of a juvenile and one count of statutory sex offense. The trial court consolidated Defendant's convictions as follows: the charge of taking indecent liberties with a child and the first count of selling or delivering a

controlled substance to a minor were consolidated under file number 08 CRS 057560 51; the second count of selling or delivering a controlled substance to a minor, along with both counts of dissemination of obscene material to a minor, were consolidated under file number 08 CRS 057560 52. Defendant was sentenced to fifty-eight months to seventy-nine months in prison for the convictions in 08 CRS 57560 51 and to a consecutive term of fifty-eight months to seventy-nine months in prison for the convictions in 08 CRS 57560 52.

The trial court also conducted a hearing to determine whether Defendant should be required to register as a sex offender and to enroll in a satellite-based monitoring program (SBM), pursuant to N.C. Gen. Stat. § 14-208.40A. The trial court found the following: (1) Defendant was convicted of a reportable conviction under N.C. Gen. Stat. § 14-208.6; (2) Defendant was "involved in an offense against a minor as defined by North Carolina law[;]" (3) Defendant was not classified as a sexually violent predator; (4) Defendant was not a recidivist; (5) the offense of conviction was not an aggravated offense; and (6) the offense of conviction did involve physical, mental, or sexual abuse of a minor. The Department of Correction's risk assessment categorized Defendant as a "moderate" risk level. The trial court found that, based on the risk assessment, Defendant did not require the highest possible level of supervision and monitoring. The trial court ordered Defendant, upon release from prison, to register as a sex offender and enroll in an SBM program for thirty years. The trial court entered its

findings and order for sex offender registration and SBM enrollment in both file numbers 08 CRS 57560 51 and 08 CRS 57560 52. Defendant gave oral notice of appeal from "the entire judgment" in open court.

I. Right of Appeal and Writ of Certiorari

Defendant requests that we treat his brief as a petition for a writ of certiorari concerning his appeal from the trial court's order requiring Defendant to register as a sex offender and to enroll in SBM for life in both 08 CRS 57560 51 and 08 CRS 57560 52. Our Court has held that "for purposes of appeal, a SBM hearing is not a 'criminal trial or proceeding' for which a right of appeal is based upon N.C. Gen. Stat. § 15A-1442 or N.C. Gen. Stat. § 15A-1444." *State v. Singleton*, ___ N.C. App. ___, ___, 689 S.E.2d 562, 565, *disc. review allowed* ___ N.C. ___, 696 S.E.2d 697 (2010). Appeals from SBM proceedings are therefore civil in nature and must comply with the rules of appellate procedure for giving notice of appeal in civil matters. *State v. Brooks*, ___ N.C. App. ___, ___, 693 S.E.2d 204, 206 (2010). Rule 3 of the North Carolina Rules of Appellate Procedure requires a defendant to file written notice of appeal with the clerk of superior court and serve notice upon all other parties. N.C.R. App. P. 3(a).

In the case before us, Defendant gave only oral notice of appeal in open court and, therefore, failed to comply with Rule 3(a). However, in *Brooks*, our Court issued a writ of certiorari to reach the merits of an appeal concerning an SBM order where the defendant gave only oral notice of appeal in violation of Rule

3(a). *Brooks*, ___ N.C. App. at ___, 693 S.E.2d at 206. In *Brooks*, our Court stated that we were granting defendant's request to treat his appeal as a petition for a writ of certiorari and thereafter we granted that petition "[i]n the interest of justice, and to expedite the decision in the public interest[.]" *Id.* (citing *Putman v. Alexander*, 194 N.C. App. 578, 581-83, 670 S.E.2d 610, 614 (2009) ("Nevertheless, this Court may issue a writ of certiorari 'when the right to prosecute an appeal has been lost by failure to take timely action.'") (citation omitted)); *see also State v. Oxendine*, ___ N.C. App. ___, ___, 696 S.E.2d 850, 853 (2010). Thus, we grant Defendant's request and treat his brief as a petition for a writ of certiorari as to the trial court's sex offender registration and SBM order, and address the merits of Defendant's appeal as to this issue. *See Brooks*, ___ N.C. App. at ___, 693 S.E.2d at 206. Defendant also requests that we issue a writ of certiorari and review the evidentiary basis for his *Alford* pleas. "*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler and Jelly*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). In our sound discretion, we decline to issue a writ of certiorari as to Defendant's *Alford* pleas.

II. Sex Offender Registration

Defendant first asserts that the trial court erred in finding that he was convicted of a "reportable conviction" in 08 CRS 057560 52. Defendant contends that the error arose from the trial court's determination that selling or delivering a controlled substance to

a person between thirteen and sixteen years of age and dissemination of obscene material to a minor were "offense[s] against a minor" for the purposes of N.C. Gen. Stat. § 14-208.6(4). The State concedes Defendant is correct in his argument on this issue and we agree.

N.C. Gen. Stat. § 14-208.6 sets forth the following definitions:[1]

> (1m) "Offense against a minor" means any of the following offenses if the offense is committed against a minor, and the person committing the offense is not the minor's parent: G.S. 14-39 (kidnapping), G.S. 14-41 (abduction of children), and G.S. 14-43.3 (felonious restraint). The term also includes the following if the person convicted of the following is not the minor's parent: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.
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> . . . .
>
> (4) "Reportable conviction" means:
>
> a. A final conviction for an offense against a minor, a sexually violent offense, or an

[1] The trial court's orders regarding sex offender registration and SBM enrollment were entered on 27 August 2009, but contain language referring to the version of N.C. Gen. Stat. § 14-208.6 which was in effect prior to 1 May 2009. Thus, the order refers to the definition of "offense against a minor" under "G.S. 14-208.6(1i)." However, N.C.G.S. § 14-208.6 was amended effective 1 May 2009, inserting new definitions in subsections (1d), (1f), (1g), (1i), and (1n). *See* 2008 N.C. Sess. 2008-220, § 1. The subsection number for the definition of "Offense against a minor" was changed from N.C.G.S. § 14-208.6(1i) to N.C.G.S. § 14-208.6(1m), but the substance of the definition was not changed. *See* N.C.G.S. § 14-208.6(1m)(2009). While the trial court's order thus refers to an incorrect statute number, because the substantive definition did not change, we refer to the current edition of the statute in our opinion, despite the language contained in the order.

> attempt to commit any of those offenses unless the conviction is for aiding and abetting. A final conviction for aiding and abetting is a reportable conviction only if the court sentencing the individual finds that the registration of that individual under this Article furthers the purposes of this Article as stated in G.S. 14-208.5.

N.C. Gen. Stat. § 14-208.6 (2009).

In 08 CRS 057560 52, Defendant was convicted of the following: selling or delivering a controlled substance to a person between thirteen and sixteen years of age in violation of N.C. Gen. Stat. § 90-95(e)(5); and dissemination of obscene material to a minor in violation of N.C. Gen. Stat. § 14-190.7. The trial court found that these were "offense[s] against a minor as defined by North Carolina law[.]" On form AOC-CR-615, the trial court checked the box containing the language, "the defendant has been convicted of a reportable conviction under G.S. 14-208.6, specifically . . . an offense against a minor under G.S. 14-208.6(1i)[.]" As stated above, N.C.G.S. § 14-208.6(1m) defines an "offense against a minor" to include only "G.S. 14-39 (kidnapping), G.S. 14-41 (abduction of children), and G.S. 14-43.3 (felonious restraint)[,]" or solicitation or conspiracy to commit one of these offenses, or aiding and abetting the commission thereof. N.C.G.S. § 14-208.6(1m). Therefore, as to 08 CRS 057560 52, the trial court erred in finding that Defendant was convicted of an offense against a minor as defined in N.C.G.S. § 14-208.6(1i). Because the trial court erred in its finding, the trial court also erred in determining that Defendant was convicted of a reportable conviction. Thus, it was error for the trial court to require

Defendant to register as a sex offender and to enroll in an SBM program for thirty years with respect to the charges in 08 CRS 057560 52. N.C. Gen. Stat. § 14-208.40(a) (2009) (stating that the SBM program is "designed to monitor three categories of offenders[,]" two of which require the offender to be convicted of a reportable conviction, and the third which is not relevant here); and N.C. Gen. Stat. § 14-208.7(a) (2009) (requiring persons convicted of reportable convictions to maintain registration). We must therefore vacate this order.

III. Satellite-Based Monitoring

Defendant next contends that the trial court erred by ordering him to enroll in SBM for thirty years. Having vacated the order in 08 CRS 057560 52, we focus on the order in 08 CRS 057560 51. Defendant argues, the State concedes, and we agree that it was error for the trial court, based on the findings set forth in its order, to require Defendant to enroll in SBM.

N.C. Gen. Stat. § 14-208.40A (2009) governs SBM hearings and provides:

> (a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), during the sentencing phase, the district attorney shall present to the court any evidence 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, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor. The district attorney shall have no discretion to withhold any evidence required to be submitted to the court pursuant to this subsection.

> . . . .
>
> (b) After receipt of the evidence from the parties, the court shall determine whether the offender's conviction places the offender in one of the categories described in G.S. 14-208.40(a) . . . .
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> (c) If the court finds that the offender has been classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of G.S. 14-27.2A or G.S. 14-27.4A, the court shall order the offender to enroll in a satellite-based monitoring program for life.
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> (d) If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that the offense is not an aggravated offense or a violation of G.S. 14-27.2A or G.S. 14-27.4A 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.
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> (e) Upon receipt of a risk assessment from the Department pursuant to subsection (d) of this section, 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. 14-208.40A (2009). In its order, the trial court made the following findings of fact:

> No. 2, that . . . [D]efendant has not been classified as a sexually violent predator.
>
> No. 3, that . . . [D]efendant is not classified as a recidivist.

> No. 4, that the offense is not an aggravated offense pursuant to North Carolina General Statute 14-208.6.
>
> No. 5, that the offense does involve the sexual abuse of a minor. And based upon the risk assessment completed by the Department of Correction, that being what is known as a Static 99, indicating that . . . [D]efendant is a moderate risk, [the c]ourt finds that . . . [D]efendant does not require the highest possible level of supervision and monitoring.

The trial court then ordered Defendant to enroll in SBM for thirty years upon release from imprisonment.

Defendant contends that the trial court should not have ordered Defendant to enroll in an SBM program for thirty years because it found that Defendant: (1) was not a sexually violent predator; (2) was not a recidivist; (3) was not convicted of an aggravated offense; and (4) did not require the highest possible level of supervision and monitoring. After reviewing the findings of fact set forth in the trial court's order, we agree with Defendant's contention that he did not satisfy any of the possible triggers of SBM enrollment set forth in N.C.G.S. § 14-208.40A. Therefore, the trial court erred in ordering that Defendant be required to enroll in an SBM program. We therefore vacate that portion of the order requiring Defendant to enroll in an SBM program.

08 CRS 057560 51 - SBM enrollment order vacated.

08 CRS 057560 52 - Sex offender registration order and SBM enrollment order vacated.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).