NO. COA09-623

NORTH CAROLINA COURT OF APPEALS

Filed: 3 November 2009

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 07 CRS 038444, 038446-47

RODNEY LABRINTH MILLER,
Defendant.

Appeal by defendant from order entered 6 February 2009 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 October 2009.

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

Robert W. Ewing, for defendant-appellant.

MARTIN, Chief Judge.

On 6 February 2009, defendant Rodney Labrinth Miller pleaded guilty to the Class B1 felonies of first-degree rape under N.C.G.S. § 14-27.2(a) and first-degree sexual offense under N.C.G.S. § 14-27.4(a), and to the Class C felony of assault with a deadly weapon with intent to kill and inflicting serious injury under N.C.G.S. § 14-32(a). Upon consolidation of the offenses, the trial court sentenced defendant to an active term of imprisonment for a minimum of 269 months and a maximum of 332 months. In its judgment, the trial court found that the offenses were "aggravated," as defined in N.C.G.S. § 14-208.6(1a), and found that

defendant was classified as a sexually violent predator pursuant to N.C.G.S. § 14-208.20. Thus, in accordance with N.C.G.S. § 14-208.40A, the trial court entered an order requiring that, upon his release from prison, defendant "shall be enrolled in a satellite-based monitoring [("SBM")] program for [the duration of his] natural life." *See* N.C. Gen. Stat. § 14-208.40A(c) (2007) ("If the court finds that the offender has been classified as a sexually violent predator . . . or has committed an aggravated offense, the court shall order the offender to enroll in a satellite-based monitoring program for life."). Defendant appeals from the order requiring him to enroll in a lifetime SBM program.

Because our General Assembly enacted the statutes establishing the SBM program in 2006, *see* Act To Protect North Carolina's Children/Sex Offender Law Changes, 2006 N.C. Sess. Laws 1065, 1074–77, ch. 247, § 15(a), defendant first contends the trial court's order requiring him to enroll in a lifetime SBM program upon his release from the Division of Prisons following his 2009 convictions for offenses he committed in 1994 violates constitutional prohibitions under the North Carolina and U.S. Constitutions against the application of *ex post facto* laws. However, this Court has already held that a "retroactive application of the SBM provisions do[es] not violate the *ex post facto* clause" because SBM is not a criminal punishment, but rather a civil remedy. *See State v. Bare*, __ N.C. App. __, __, 677 S.E.2d 518, 531 (2009). Since defendant in the present case "has failed

to show [in the record before us] that the effects of SBM are sufficiently punitive to transform the civil remedy into criminal punishment," *see id.*, we must overrule this assignment of error. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "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 next contends the SBM statutes as applied violate his constitutionally protected right to privacy. However, in the proceeding below, defendant failed to assert that SBM implicated his fundamental right to privacy. Since it is a "'well established rule of appellate courts . . . [that] we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below,'" *State v. Crews*, 286 N.C. 41, 48, 209 S.E.2d 462, 466 (1974) (quoting *State v. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955)), *cert. denied*, 421 U.S. 987, 44 L. Ed. 2d 477 (1975), and since the issue of whether the SBM statutes implicated defendant's constitutionally protected fundamental right to privacy was not before the trial court below, we conclude the issue was not properly preserved for appeal. We further decline defendant's request to exercise our discretion pursuant to Appellate Rule 2 to consider the issue.

Affirmed.

Judges JACKSON and ERVIN concur.

Report per Rule 30(e).