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NO. COA09-870

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v.

Robeson County  
No. 08 CRS 53860

WILLIAM LEE PAIT, JR.

Appeal by defendant from order entered 10 December 2008 by Judge Robert F. Floyd, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 14 January 2010.

*Attorney General Roy Cooper, by Assistant Attorney General Yvonne B. Ricci, for the State.*

*Richard E. Jester, for defendant-appellant.*

CALABRIA, Judge.

William Lee Pait, Jr. ("defendant"), appeals the trial court's order directing him to enroll in satellite-based monitoring ("SBM") pursuant to N.C. Gen. Stat. § 14-208.40 *et seq.* (2007). We affirm in part and dismiss in part.

I. BACKGROUND

Defendant was convicted of first degree kidnapping and indecent liberties with a child on 9 May 2008 in Cumberland County Superior Court.<sup>1</sup> On 10 December 2008, in Robeson County Superior

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<sup>1</sup>The judgment and commitment for these offenses was not included in the record on appeal.

Court, defendant entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), to attempted solicitation of a child by computer. The trial court sentenced defendant to a minimum term of eight months to a maximum term of ten months in the custody of the North Carolina Department of Correction to be served concurrently with the sentence defendant was presently serving. The trial court also recommended psychiatric or psychological counseling. Defendant was ordered to register as a sex offender for his natural life within three days of his release date.

On 10 December 2008, the trial court held a determination hearing pursuant to N.C. Gen. Stat. § 14-208.40B (2007). The court found that defendant was convicted of a reportable conviction as defined in N.C. Gen. Stat. § 14-208.6(4) (2007), that defendant was a danger to the community, and that defendant was a recidivist as defined in N.C. Gen. Stat. § 14-208.6(2b) (2007). Defendant was ordered, upon his release from imprisonment, to enroll in SBM for his natural life unless the monitoring program was terminated pursuant to N.C. Gen. Stat. § 14-208.43. Defendant appeals.

## II. PRESERVATION OF OBJECTIONS

As an initial matter, we note that defendant concedes that this Court has held that North Carolina's SBM scheme under N.C. Gen. Stat. § 14-208.40 *et seq.* is civil rather than punitive in nature. See *State v. Bare*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 677 S.E.2d 518, 531 (2009); *State v. Anderson*, \_\_\_ N.C. App. \_\_\_, 679 S.E.2d 165 (2009). Defendant notes in his brief that the defendant in *Bare*

has sought discretionary review from our Supreme Court on this issue. Therefore, defendant presents his argument to preserve the issue of whether imposition of SBM violates the *Ex Post Facto* Clause of the United States Constitution should our Supreme Court or the United States Supreme Court reverse our decisions in *Bare, Anderson*, and their progeny.

### III. CONSTITUTIONALITY OF SBM

#### A. Right to Privacy

Defendant argues that SBM is unconstitutional because it violates his right to privacy. We disagree.

"[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). "[I]n conformity with the well established rule of appellate courts, 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. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955) (emphasis added). "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1) (2009). "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

In the instant case, during defendant's determination hearing, defendant's counsel objected to the imposition of SBM on grounds that it violated defendant's right to be free from unreasonable searches and seizures, his right to interstate travel, and his right to be free from cruel and unusual punishment. Nothing in the record shows that defendant objected to SBM on privacy grounds. Therefore, defendant did not properly preserve the issue for appeal, and his assignment of error is dismissed.

B. Right to be Free from Cruel and Unusual Punishment

Defendant argues that SBM violates his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. We disagree.

"In *Bare*, we concluded that the legislature intended satellite-based monitoring to be a civil and regulatory scheme, [and] that the restrictions imposed by the satellite-based monitoring provisions do not negate the legislature's expressed civil intent . . . ." *State v. Vogt*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 685 S.E.2d 23, 25 (2009) (internal quotations, citations, and brackets omitted). "[W]e determined the SBM provisions are not punitive[.]" *Bare*, \_\_\_ N.C. App. at \_\_\_, 677 S.E.2d at 531. "'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.'" *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 133-34 (2004) (quoting *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d

30, 37 (1989)). Since we have already concluded that SBM does not violate defendant's right to be free from cruel and unusual punishment, defendant's assignment of error is overruled.

C. Right to be Free from Unreasonable Searches and Seizures

Defendant argues that SBM violates his right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution. A defendant's assignment of error is deemed abandoned and we will decline to address it when "the defendant has cited no reasonable authority in its support." *State v. Bonney*, 329 N.C. 61, 82, 405 S.E.2d 145, 157 (1991); see also N.C.R. App. P. 28(b)(6) (2009) ("Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned."). Since defendant's assignment of error contains no reasonable authority to support his argument, this assignment of error is abandoned.

D. Right to Travel

Defendant argues that SBM violates his right to interstate travel under the Fourteenth Amendment to the United States Constitution. We disagree.

The government may only interfere with the exercise of the right to travel if it can show that such interference is necessary to promote a compelling government interest. *Saenz v. Roe*, 526 U.S. 489, 499, 143 L. Ed. 2d 689, 701-02, 119 S.Ct. 1518, 1524 (1999). However, a plaintiff must present evidence that his right to travel has been violated. See *Spencer v. Casavilla*, 839 F.Supp. 1014, 1017 (S.D.N.Y. 1993), *aff'd in part and dismissed in part*, 44

F.3d 74 (2d Cir. 1994); see also *Bare*, \_\_\_ N.C. App. at \_\_\_, 677 S.E.2d at 529 (“[D]efendant argues that the [monitoring] device has ‘hindered his ability to obtain employment.’ However, defendant did not present any testimony or evidence at his determination hearing as to his inability to obtain employment.”).

In the instant case, counsel for defendant stated:

[Defendant] is a truck driver by profession. He travels across the country to do his work. Satellite monitoring equipment is required to be plugged in for several hours every day. Certainly that would interfere with his right to travel and to conduct business across the country because when you are traveling in a truck, you are not necessarily going to have the ability to plug something into an electric outlet.

“However, the statements of counsel are not evidence. ‘[I]t is axiomatic that the arguments of counsel are not evidence.’” *Bare*, \_\_\_ N.C. App. at \_\_\_, 677 S.E.2d at 529 (quoting *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996)). Since we are unable to find any evidence in the record showing that defendant’s right to travel was violated, defendant’s assignment of error is overruled.

#### E. Right to Trial by Jury

Defendant argues that imposing SBM violates his right to a trial by jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. He also argues that imposing SBM violates his right to proper notice and indictment before being punished as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. However, defendant concedes that he did not specifically object at the determination hearing to the

imposition of SBM as a violation of either of these rights. Therefore, defendant did not properly preserve the issue for appeal, and his assignment of error is dismissed.

IV. CONCLUSION

Defendant's remaining assignments of error which he fails to argue in his brief are abandoned. N.C.R. App. P. 28(b)(6) (2009). We affirm the trial court's order requiring defendant to enroll in SBM.

Affirmed in part and dismissed in part.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).