

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-46

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

STATE OF NORTH CAROLINA

v.

Scotland County
No. 03 CRS 51585

JOHN DURHAM BRIGMAN

Appeal by defendant from order entered 6 October 2009 by Judge D. Jack Hooks in Scotland County Superior Court. Heard in the Court of Appeals 17 August 2010.

Attorney General Roy Cooper, by Special Counsel Hilary S. Peterson, for the State.

Mercedes O. Chut, for defendant-appellant.

CALABRIA, Judge.

John Durham Brigman ("defendant"), appeals the trial court's order directing him to enroll in lifetime satellite-based monitoring ("SBM") pursuant to N.C. Gen. Stat. § 14-208.40B (2009). We affirm.

I. Background

On 1 June 2000, defendant pled guilty to indecent liberties with a child in file number 99 CRS 7696 in Scotland County Superior Court. The trial court sentenced defendant to a minimum term of 19 months to a maximum term of 23 months in the North Carolina

Department of Correction. That sentence was suspended and defendant was placed on supervised probation for 36 months.

On 8 September 2003, defendant again pled guilty to indecent liberties with a child in Scotland County Superior Court. Pursuant to the plea arrangement between defendant and the State, the trial court activated defendant's sentence in 99 CRS 7696 and sentenced defendant to a minimum term of 25 months to a maximum term of 30 months in the North Carolina Department of Correction, to be served at the expiration of defendant's active sentence in 99 CRS 7696.

On 6 October 2009, the trial court held a determination hearing pursuant to N.C. Gen. Stat. § 14.208.40B (2009). Based on defendant's two prior convictions, the trial court found that defendant was a recidivist as defined in N.C. Gen. Stat. § 14-208.6(2b) (2009). Defendant was ordered to enroll in SBM for the remainder of his natural life. Defendant appeals.

II. *Ex Post Facto*

Defendant argues that the imposition of SBM is unconstitutional because it is punitive in nature and its retroactive application violates the constitutional prohibition against *ex post facto* laws. We disagree.

Defendant concedes that this Court has previously held that North Carolina's SBM provisions are neither punitive nor an *ex post facto* violation. "In *Bare*, we concluded that the legislature intended satellite-based monitoring to be a civil and regulatory scheme, that the restrictions imposed by the satellite-based monitoring provisions do not negate the legislature's expressed

civil intent, and that retroactive application of the satellite-based monitoring provisions does not violate the *ex post facto* clause." *State v. Vogt*, __ N.C. App. __, __, 685 S.E.2d 23, 25 (2009) (internal quotations, citations, and brackets omitted).

While defendant correctly notes that this issue is currently under consideration by our Supreme Court, we are bound by our determination in *Bare*. See *In re Appeal from 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."). This assignment of error is overruled.

III. Recidivist Classification

Defendant argues that the trial court erred in classifying defendant as a "recidivist" and, therefore, erred in ordering defendant to enroll in SBM for the remainder of his natural life. We disagree.

Defendant concedes that this argument was not made at trial, but now asserts that this issue is properly raised on appeal because it constitutes plain error. However, the application of the plain error doctrine is limited to appeals in criminal cases and does not apply to appeals in civil cases. *Durham v. Quincy Mut. Fire Ins. Co.*, 311 N.C. 361, 367, 317 S.E.2d 372, 377 (1984); N.C.R. App. P. 10(a)(4) (2009). Since the imposition of SBM is part of a civil and regulatory scheme, plain error review is not available to defendant on this issue.

In order to preserve an issue 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. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C.R. App. P. 10(a)(1) (2009). "Rule [10(a)] is not simply a technical rule of procedure and a party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *State v. Davis*, __ N.C. App. __, __, 678 S.E.2d 709, 712 (2009) (internal quotations and citation omitted).

In the instant case, during defendant's determination hearing, defendant's counsel objected to the imposition of SBM on grounds that it was retroactive punishment. Nothing in the record or transcript from the determination hearing indicates that defendant objected to SBM on the grounds that the trial court erred in classifying defendant as a recidivist. Thus, defendant did not properly preserve this issue for appellate review. This assignment of error is overruled.

IV. Conclusion

The record on appeal contains an additional issue not presented in defendant's brief. This issue is deemed abandoned pursuant to N.C.R. App. P. 28(b)(6) (2009). We affirm the trial court's order requiring defendant to enroll in lifetime SBM.

Affirmed.

Judges HUNTER, Robert C. and ARNOLD concur.

Report per Rule 30(e).