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NO. COA13-120  
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v. Mecklenburg County  
Nos. 04 CRS 235596  
JEHON MASKE, 04 CRS 235597  
Defendant.

Appeal by defendant from order entered 3 August 2012 by Judge F. Lane Williamson in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 October 2013.

*Attorney General Roy Cooper, by Assistant Attorney General Kimberly Grande and Assistant Attorney General Joseph L. Hyde, for the State.*

*Daniel F. Read for defendant-appellant.*

GEER, Judge.

Defendant Jehon Maske appeals from the trial court's order requiring him to enroll in satellite based monitoring ("SBM") for life. On appeal, defendant primarily argues that imposition of SBM violated his contractual rights arising from his plea agreement with the State. We hold, under *State v. Vogt*, 200 N.C. App. 664, 685 S.E.2d 23 (2009), *aff'd per curiam*, 364 N.C.

425, 700 S.E.2d 224 (2010), that defendant's contractual rights arising from his plea agreement were not violated by imposition of SBM. Because we also find defendant's remaining arguments unpersuasive, we affirm the trial court's order.

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On 13 October 2005, defendant pled guilty to second degree rape and taking indecent liberties with a minor. The trial court consolidated the offenses into a single judgment and sentenced defendant to a mitigated-range term of 60 to 81 months imprisonment.

On 27 April 2012, the State filed a motion to determine whether defendant was required to enroll in the sex offender SBM program. On 3 August 2012, the trial court entered an order requiring that defendant be enrolled in SBM for life. Defendant filed notice of appeal on 11 September 2012.

#### Discussion

We first address this Court's jurisdiction over defendant's appeal. Defendant's notice of appeal was not filed within 30 days after entry of the SBM order as required by Rule 3(c) of the North Carolina Rules of Appellate Procedure. Defendant's failure to timely file a written notice of appeal subjects his appeal to dismissal. See *State v. May*, 207 N.C. App. 260, 262, 700 S.E.2d 42, 44 (2010) (dismissing appeal where defendant

"failed to give timely written notice of appeal" in accordance with Rule 3, from trial court's SBM order). We must, therefore, dismiss defendant's appeal. *Id.*

Recognizing this potential defect in his notice of appeal, defendant filed a petition for writ of certiorari seeking review of the SBM order. A writ of certiorari may be issued to permit review of the judgments and orders of trial tribunals "when the right to prosecute an appeal has been lost by failure to take timely action." N.C.R. App. P. 21(a)(1). Because it appears defendant lost his right to appeal through no fault of his own, we exercise our discretion to allow defendant's petition and review the trial court's order.

Defendant first argues that the trial court erred in entering the SBM order because the order constituted an improper modification of the contract between defendant and the State arising from defendant's guilty pleas. Defendant contends that this improper modification violated his contractual rights under the plea agreement including his rights under the Contracts Clause of the United States Constitution, U.S. Const. art. I, § 10; his right to be informed of the direct consequences of his guilty plea; and his rights under N.C. Gen. Stat. § 15A-1022 (2011). Defendant's arguments are premised upon his assertions

that he did not consent to SBM and was not apprised of the possibility of SBM when he entered his guilty pleas.

With respect to defendant's contractual arguments, this Court rejected the nearly identical argument that a court erred in entering an SBM order because SBM imposed "punishment over and above that contemplated under [the defendant's] plea agreement." *Vogt*, 200 N.C. App. at 671, 685 S.E.2d at 28. The Court reasoned that SBM "is a civil and regulatory rather than a punitive regime." *Id.* With respect to defendant's statutory argument, this Court has further held that "[b]ecause . . . SBM provisions are not punitive, N.C. Gen. Stat. § 15A-1022(a) is not implicated." *State v. Bare*, 197 N.C. App. 461, 479, 677 S.E.2d 518, 531 (2009).

Turning to defendant's argument that he was not informed of the possibility of SBM prior to acceptance of his plea, this Court has twice held that the possibility of SBM was not a direct consequence of a plea agreement such that a defendant must be apprised of the possibility of SBM prior to pleading. *See id.* at 480, 677 S.E.2d at 531-32 ("[I]mposition of SBM was not an automatic result of [the defendant's] no contest plea, unlike a mandatory minimum sentence or an additional term of imprisonment."); *Vogt*, 200 N.C. App. at 667, 685 S.E.2d at 25

(following *Bare* and affirming court's SBM order based on same reasoning).

Defendant attempts to distinguish *Bare* by pointing to the *Bare* Court's reasoning that the SBM implications of the defendant's plea were not a direct consequence of the plea in that case because the trial court had to determine, in a separate hearing, the factual issue whether the defendant was a recidivist under the SBM statutes. See *Bare*, 197 N.C. App. at 480, 677 S.E.2d at 531. In this case, the fact requiring SBM was not recidivism, but rather that defendant was convicted of an aggravated offense, and, defendant asserts, the fact of his aggravated offense conviction "was provable from records of which the court could take judicial notice." Unlike in *Bare*, defendant reasons, the court in this case "had no discretion but was bound by statute to enter the order he did."

We are not persuaded. As in *Bare*, "[d]efendant's argument is predicated on the assumption that SBM is a punishment," and, since "the SBM provisions are not punitive," neither N.C. Gen. Stat. § 15A-1022(a) nor the rule a defendant must be apprised of the direct consequences of a guilty plea are implicated. 197 N.C. App. at 479, 677 S.E.2d at 531. See also *State v. Bozeman*, 115 N.C. App. 658, 661, 446 S.E.2d 140, 142 (1994) ("'Direct consequences' have been defined as those which have a 'definite,

immediate and largely automatic effect on the range of the defendant's punishment.'" (quoting *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973))). We hold, under *Bare* and *Vogt*, that the SBM order did not violate defendant's contractual rights under the Contracts Clause or otherwise; his rights under N.C. Gen. Stat. § 15A-1022; or his right to be informed of the direct consequences of his plea.

Defendant further contends that imposition of SBM violates his rights to be free from double jeopardy and ex post facto punishment. Both of these arguments have been rejected by our Courts. *State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010) ("[S]ubjecting defendants to the SBM program does not violate the Ex Post Facto Clauses of the state or federal constitution."); *State v. Anderson*, 198 N.C. App. 201, 204-05, 679 S.E.2d 165, 167 (2009) ("As this Court has held that [SBM] does not constitute a punishment, it cannot constitute a violation of Defendant's right to be free from double jeopardy."). We are bound by prior decisions of this Court on the same issue of law, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989), and by our Supreme Court's holding in *Bowditch*. Consequently, we affirm the order of the trial court.

Affirmed.

Judges ERVIN and DILLON concur.

Report per Rule 30(e).