

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-185
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 02 CRS 238864
DALVIN EGGLESTON, 02 CRS 238869
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 Jodi Harrison and Assistant Attorney General Joseph L. Hyde, for the State.

Daniel F. Read for defendant-appellant.

GEER, Judge.

Defendant Dalvin Eggleston appeals from the trial court's order requiring him to enroll in satellite based monitoring ("SBM") for life. On appeal, defendant primarily contends that imposition of SBM violated his contractual rights arising from his plea agreement with the State. We hold that this argument is foreclosed by this Court's opinion in *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). Because we also find defendant's remaining arguments unpersuasive, we affirm the trial court's order.

On 27 August 2003, defendant pled guilty to two counts of second degree rape. Pursuant to a plea agreement, the trial court consolidated the convictions into a single judgment and sentenced defendant to a term of 65 to 87 months imprisonment.

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

Discussion

We must initially 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 his 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" as

required by Rule 3 from trial court's SBM order). We, therefore, must dismiss defendant's appeal. *Id.*

Defendant has, however, 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 is apparent from the record that 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 as protected by 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 based on his assertions that he did not consent to SBM and was not apprised of the possibility that he would be subject to 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" because, among other reasons, SBM "is a civil and regulatory rather than a punitive regime." *Vogt*, 200 N.C. App. at 671, 685 S.E.2d at 28. 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).

Finally, this Court has twice held that the possibility that a defendant may be subjected to SBM is not a direct consequence of a plea agreement such that a defendant must be apprised of the possibility that he or she might be subjected to 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 nonetheless attempts to distinguish *Bare* by pointing to the *Bare* Court's reasoning that the SBM-related implications of the defendant's plea were not a direct

consequence of the plea 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. Here, the fact requiring SBM was not recidivism, but rather was the fact 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, here, the court "had no discretion but was bound by statute to enter the order he did."

However, 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))).

Under *Bare* and *Vogt*, the SBM order did not violate defendant's contractual rights, his right to be informed of the direct consequences of his plea, or his rights under N.C. Gen. Stat. § 15A-1022. Defendant's additional arguments that imposition of SBM violates his rights to be free from double jeopardy and ex post facto punishment have been rejected by our Courts. See *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, 37 (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).