

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-345  
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v.

Davidson County  
No. 12 CRS 3711

DANA SCOTT

Appeal by defendant from order entered 13 November 2012 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 10 September 2013.

*Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.*

*J. Edward Yeager, Jr., for defendant-appellant.*

McCULLOUGH, Judge.

Dana Scott ("defendant") appeals from the trial court's order requiring him to enroll in satellite-based monitoring (SBM) for the remainder of his natural life. For the following reasons, we affirm.

I. Background

On 9 September 2003, defendant was convicted of second-degree rape and second-degree sexual offense. The convictions

were consolidated for judgment and defendant was sentenced to an active term of 107 to 138 months imprisonment. On 29 February 2012, defendant was released after serving approximately 101 months.

Subsequent to defendant's release, defendant received notice from the North Carolina Department of Public Safety Division of Adult Correction ("DPS") that he was required to appear for a SBM Court Determination Hearing (the "bring-back hearing"). The bring-back hearing was held in Davidson County Superior Court on 13 November 2012, the Honorable Mark E. Klass, Judge presiding. Defendant was present with counsel.

During the bring-back hearing, defendant stipulated to his 9 September 2003 conviction for second-degree rape. Based on that conviction, the trial court found that defendant had been convicted of an aggravated offense requiring SBM and ordered defendant to enroll in SBM for the remainder of his natural life. Defendant gave oral notice of appeal in open court.

## II. Discussion

The sole issue on appeal is whether the trial court erred in ordering defendant to enroll in SBM for the remainder of his natural life. However, as an initial matter, we must address whether defendant's appeal is properly before this Court.

Jurisdiction

"Our Court has held that SBM hearings and proceedings are not criminal actions, but are instead a 'civil regulatory scheme[.]'" *State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010) (citing *State v. Bare*, 197 N.C. App. 461, 472, 677 S.E.2d 518, 527 (2009)). Thus, "oral notice pursuant to N.C.R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court. Instead, a defendant must give notice of appeal pursuant to N.C.R. App. P. 3(a) as is proper 'in a civil action or special proceeding[.]'" *Id.* at 194-95, 693 S.E.2d at 206 (quoting N.C.R. App. P. 3(a)). N.C.R. App. P. 3(a) provides that a party "may take appeal [from a civil order] by filing [written] notice of appeal with the clerk of superior court and serving copies thereof upon all other parties[.]" N.C.R. App. P. 3(a) (2013).

In the present case, defendant gave only oral notice of appeal from the trial court's order requiring him to enroll in SBM for the remainder of his natural life. Accordingly, this Court lacks jurisdiction and must dismiss defendant's appeal. See *State v. Cowan*, 207 N.C. App. 192, 195, 700 S.E.2d 239, 241 (2010) (holding failure to give proper notice of appeal pursuant

to N.C.R. App. P. 3(a) requires dismissal because the requirements of N.C.R. App. P. 3 are jurisdictional).

Defendant, however, aware of his error below, has submitted a petition for writ of certiorari contemporaneously with his brief on appeal. "The writ of certiorari may be issued in appropriate circumstances by either appellate court 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) (2013). Pursuant to this Court's authority under N.C.R. App. P. 21(a)(1), we allow defendant's petition and review the merits of his appeal.

#### Notice of Bring-Back Hearing

On appeal, defendant argues the trial court erred in ordering him to enroll in SBM for the remainder of his natural life because the notice of the bring-back hearing provided to him was deficient, resulting in a violation of his due process rights.

N.C. Gen. Stat. § 14-208.40B governs notice "[w]hen an offender is convicted of a reportable conviction as defined by [N.C. Gen. Stat. §] 14-208.6(4), and there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring[.]" N.C. Gen.

Stat. § 14-208.40B(a) (2011). The portions of the statute pertinent to the resolution of this case provide that “the Division of Adult Correction shall make an initial determination on whether the offender falls into one of the categories described in [N.C. Gen. Stat. §] 14-208.40(a).” *Id.* “If the Division of Adult Correction determines that the offender falls into one of the categories described in [N.C. Gen. Stat. §] 14-208.40(a), . . . [t]he Division of Adult Correction shall notify the offender of the Division of Adult Correction’s determination . . . .” N.C. Gen. Stat. § 14-208.40B(b).

In this case, defendant was provided notice of the SBM hearing by letter dated 27 July 2012. The notice provided:

The Department of Correction has made the initial determination that you have been convicted of an aggravated offense as defined in [N.C. Gen. Stat. §] 14-208.6(1a) and thus meet the criteria set out in [N.C. Gen. Stat. §] 14-208.40(a)(1), which requires your enrollment in Satellite Based Monitoring for life. This is based on your Conviction of Sexual Offense 2ND Degree on September 09, 2003 in Forsyth County.

However, at trial, the State admitted that defendant’s second-degree sexual offense conviction was not an automatic aggravated offense and instead sought SBM based on defendant’s prior conviction for second-degree rape. Defendant then stipulated to the conviction and the trial court ordered SBM.

Now on appeal, defendant cites to this Court's decision in *State v. Stines*, 200 N.C. App 193, 683 S.E.2d 411 (2009), in support of his argument that the notice he received from DPS was deficient. In *Stines* we held "N.C. Gen. Stat. § 14-208.40B(b)'s requirement that the Department 'notify the offender of [its] determination' mandates that the Department, in its notice, specify the category set out in N.C. Gen. Stat. § 14-208.40(a) into which the Department has determined the offender falls and briefly state the factual basis for that conclusion." *Id.* at 204, 683 S.E.2d at 418. Therefore, we reversed the order in *Stines* requiring the defendant to enroll in SBM because there was no indication in the notice to the defendant of the category into which he fell nor the basis for that conclusion. *Id.*

Upon review of the notice in the present case, we recognize that DPS erred in recording the wrong conviction from 9 September 2003 in the notice to defendant. Nevertheless, we hold the defect in the notice does not rise to the level of that in *Stines* and does not warrant reversal as a denial of due process in the present case.

Whereas there was no indication of the category and basis for SBM in *Stines*, in this case the notice to defendant provided that DPS made an initial determination that he met the criteria

for SBM based on his conviction of an aggravated offense on 9 September 2003. Although the notice listed the wrong offense, we hold the notice sufficient to inform defendant of the basis for DPS's initial SBM eligibility determination. Furthermore, defendant did not object to the notice and did not argue that imposition of SBM was inappropriate in his case. Instead, defendant stipulated to his conviction for second-degree rape and stated, "It was an unfortunate event that happened. Unfortunately, he has gotten caught in this position and he's going to have to wear this bracelet, and hopefully petition the court when the time is right to be able to have it taken off." Lastly, we find it appropriate to note that second-degree rape has been determined to be an aggravated offense. See *State v. McCravey*, 203 N.C. App. 627, 641, 692 S.E.2d 409, 420 (2010) ("As the essential elements of second-degree rape are covered by the plain language of 'aggravated offense' as defined by N.C. Gen. Stat. § 14-208.6(1a), we hold that second-degree rape is an 'aggravated offense' and the trial court did not err in ordering defendant to lifetime SBM . . . .").

### III. Conclusion

Based on the reasons in the discussion above, we affirm the order of the trial court.

Affirmed.

Judges MCGEE and DILLON concur.

Report per Rule 30(e).