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NO. COA13-47
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 12 CRS 18886

NATHANIEL WILLIAMS,
Defendant.

Appeal by defendant from order entered 28 September 2012 by Judge F. Lane Williamson in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 June 2013.

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

Ryan McKaig for defendant-appellant.

GEER, Judge.

Defendant Nathaniel Williams appeals from the trial court's order requiring him to enroll in satellite-based monitoring ("SBM") for life. On appeal, defendant primarily argues that the trial court lacked subject matter jurisdiction to enter the SBM order because the record does not sufficiently establish that the State complied with the notice provisions set out in N.C. Gen. Stat. § 14-208.40B(b) (2011) for SBM hearings

conducted subsequent to a defendant's sentencing hearing. We hold, under *State v. Wooten*, 194 N.C. App. 524, 669 S.E.2d 749 (2008), that the notice provisions of N.C. Gen. Stat. § 14-208.40B(b) do not relate to the trial court's subject matter jurisdiction over SBM proceedings governed by that statute and, therefore, that the trial court properly exercised its subject matter jurisdiction in this case.

Facts

On 27 April 2012, the State filed a "MOTION FOR DETERMINATION OF WHETHER DEFENDANT IS REQUIRED TO ENROLL IN THE SEX OFFENDER SATELLITE MONITORING PROGRAM," alleging defendant was convicted of second degree rape in Pitt County in 1991 and of sexual battery in Pitt County in 2008, making him a "[r]ecidivist" under N.C. Gen. Stat. § 14-208.6 (2011). The motion further alleged that there had been no prior hearing to determine whether defendant was required to enroll in North Carolina's SBM program, that "[t]he [North Carolina] Department of Correction ha[d] notified the Defendant of this hearing by certified mail as set forth in N.C. Gen. Stat. 14-208.40B(b)," and that "[t]his matter ha[d] been set for hearing no sooner than fifteen (15) days from the date that the notification was mailed to the Defendant."

Defendant failed to appear at a 3 August 2012 hearing on the State's motion, although his court-appointed attorney made an appearance at that hearing. The trial court, therefore, entered an order for defendant's arrest. Defendant was arrested at some point and held in jail until a 28 September 2012 hearing on the State's motion. At the 28 September hearing, the same appointed attorney who appeared for defendant at the 3 August hearing moved to continue the hearing because she had never met with defendant about the case, she was not given notice of the petition in the case, she was not informed that the State alleged defendant was a recidivist, and she was given no notice that the State was seeking lifetime SBM. Defense counsel argued she could not "properly represent" defendant under those circumstances.

The trial court initially stated it would grant defendant's motion to continue, but after being informed by the prosecutor that defendant had already failed to appear at the 3 August hearing, which resulted in defendant's being arrested, the trial court stated it remembered defendant, and defendant had already had "a number of chances." The court then denied defendant's motion to continue.

Defendant made no further arguments at the hearing, and the trial court entered an order that day finding that "[t]he

District Attorney scheduled a hearing in the county named above, which is the county of the defendant's residence, the Department of Correction provided notice to the defendant as required by G.S. 14-208.40B, and the hearing was not held sooner than 15 days after the date the Department gave notice." The order further found that defendant had been convicted of a reportable conviction and was a recidivist. The court, therefore, ordered that defendant enroll in SBM for life. Defendant timely appealed to this Court.

Discussion

Defendant first argues that the trial court lacked subject matter jurisdiction to enter the SBM order. Specifically, defendant contends that the trial court's subject matter jurisdiction was contingent upon the State's compliance with the notice provisions of N.C. Gen. Stat. § 14-208.40B(b) and that since the trial record contains no written notice or other affirmative proof of the substance of any notice sent by the State in this case, the State cannot show it complied with the notice requirements.

"When an offender is convicted of a reportable conviction as defined by G.S. 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, the Division

of Adult Correction shall make an initial determination on whether the offender falls into one of the categories described in G.S. 14-208.40(a)." N.C. Gen. Stat. § 14-208.40B(a). "If the Division of Adult Correction determines that the offender falls into one of the categories described in G.S. 14-208.40(a), the district attorney, representing the Division of Adult Correction, shall schedule a hearing in superior court for the county in which the offender resides." N.C. Gen. Stat. § 14-208.40B(b). Further, "[t]he Division of Adult Correction shall notify the offender of the Division of Adult Correction's determination and the date of the scheduled hearing by certified mail sent to the address provided by the offender pursuant to G.S. 14-208.7[,]" and "[t]he hearing shall be scheduled no sooner than 15 days from the date the notification is mailed." *Id.*

In this case, the State's motion alleged that the Department of Correction notified defendant of the hearing by certified mail as required in N.C. Gen. Stat. § 14-208.40B(b) and that the hearing had been set no sooner than 15 days from the date that the notification was mailed to defendant. In its order, the trial court found that "the Department provided notice to the defendant as required by G.S. 14-208.40B, and the hearing was not held sooner than 15 days after the date the

Department gave notice." The record does not, however, contain the actual notice allegedly mailed to defendant, a certified mail receipt showing defendant received any notice, or any other information about the notice. Nevertheless, defendant was present at the 28 September 2012 hearing and was represented by appointed counsel, which he concedes demonstrates he was given "some notice" of the hearing.

"Jurisdiction is '[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.'" *Wooten*, 194 N.C. App. at 527, 669 S.E.2d at 750 (quoting *Black's Law Dictionary* 869 (8th ed. 2004)). A court "must have subject matter jurisdiction, or '[j]urisdiction over the nature of the case and the type of relief sought,' in order to decide a case." *Id.* (quoting *Black's Law Dictionary* at 870).

In *Wooten*, the defendant argued on appeal that the trial court lacked subject matter jurisdiction to enter an order requiring the defendant to enroll in SBM since, although the defendant had been given notice of the hearing, the State failed to follow the literal requirements of N.C. Gen. Stat. § 14-208.40B(b)'s notice provisions because the defendant was still in prison at the time he was given notice of the hearing and, thus, was not given notice by certified mail at a residential

address provided to the local sheriff's office pursuant to the sex offender registry. 194 N.C. App. at 526, 527, 669 S.E.2d at 750, 751. This Court rejected the defendant's argument, reasoning that interpreting the statute to require literal compliance with the notice provision as a prerequisite to establishing the trial court's subject matter jurisdiction would "create a situation where the court would lack subject matter jurisdiction over an entire class of offenders to whom the legislature intended the statute applied." *Id.* at 528, 669 S.E.2d at 751. Therefore, the Court held, noncompliance with the notice provisions did not deprive the trial court of jurisdiction over the case, and "the notice provisions found in N.C. Gen. Stat. § 14-208.40B(b) are merely that, notice provisions to protect the due process rights of offenders who are not currently incarcerated." *Id.*

Similarly, here, the lack of evidence in the record supporting the State's allegation, and the trial court's finding, that defendant was given proper statutory notice does not impact the trial court's subject matter jurisdiction to enter the SBM order. This Court has explained in an analogous context that although the filing of a proper complaint is required to vest the trial court with subject matter jurisdiction under the Rules of Civil Procedure, *Estate of*

Livesay v. Livesay, ___ N.C. App. ___, ___, 723 S.E.2d 772, 774 (2012), the defenses of insufficiency of process and insufficiency of service of process may be waived, *City of Charlotte v. Noles*, 143 N.C. App. 181, 183, 544 S.E.2d 585, 586 (2001), and, therefore, do not impact subject matter jurisdiction. See *Faucette v. Dickerson*, 103 N.C. App. 620, 623, 406 S.E.2d 602, 605 (1991) ("A North Carolina court which has subject matter jurisdiction in an action may exercise jurisdiction over a person making a general appearance in an action without service of process."). Under *Wooten*, the notice provisions of N.C. Gen. Stat. § 14-208.40B(b) -- which are akin to service of process in that they provide notice of the proceeding -- are likewise unconnected to the trial court's subject matter jurisdiction over the SBM proceedings provided for in that statute. 194 N.C. App. at 528, 669 S.E.2d at 751.

Defendant nonetheless cites *State v. Self*, ___ N.C. App. ___, 720 S.E.2d 776 (2011), in support of his argument. In *Self*, this Court rejected the defendant's argument that "the trial court lacked subject matter jurisdiction to conduct an SBM determination hearing because [the Department] did not file a complaint or issue a summons to defendant as required by the North Carolina Rules of Civil Procedure." *Id.* at ___, 720 S.E.2d at 777. The Court explained that "'our General Assembly

devised a separate procedure for determining eligibility for SBM and clearly granted the Superior Courts subject matter jurisdiction to conduct these determinations pursuant to specific statutory procedures.'" *Id.* at ___, 720 S.E.2d at 777 (quoting *State v. Jarvis*, ___ N.C. App. ___, ___, 715 S.E.2d 252, 257 (2011)). Since "N.C. Gen. Stat. § 14-208.40B(b) (2009) . . . d[id] not require [the Department] to either file a complaint or issue a summons in order to provide a defendant with adequate notice of an SBM determination hearing," the Court held that those procedures were not required to establish subject matter jurisdiction. *Id.* at ___, 720 S.E.2d at 777. However, the Court did not hold in *Self* that the *notice provisions* of N.C. Gen. Stat. § 14-208.40B(b) governed the trial court's subject matter jurisdiction, and *Wooten* forecloses that conclusion.

Although defendant also cites *State v. Stines*, 200 N.C. App. 193, 204, 683 S.E.2d 411, 418 (2009), and *State v. Cowan*, 207 N.C. App. 192, 204, 700 S.E.2d 239, 247 (2010), in support of his argument, those cases reversed SBM orders based upon arguments that the notices received failed to comply with the statutory requirement that the notices state upon which of several grounds the Department initially determined the defendants to be subject to SBM. Neither *Stines* nor *Cowan* held

that the notice requirements implicated the trial court's subject matter jurisdiction.

To the extent defendant argues the record on appeal in this case is deficient since it does not include the notice allegedly mailed by the State, it is "the duty of the appellant to see that the record is properly made up and transmitted to the appellate court." *State v. Perry*, 316 N.C. 87, 107, 340 S.E.2d 450, 462 (1986). Although defendant concedes that, generally, "a silent record supports a presumption that the proceedings below are free from error," *id.*, he asks this Court to create an "exception for satellite based monitoring hearings and hold that the State's failure to demonstrate proper statutory notice deprives a trial court of subject matter jurisdiction." In support of this argument, defendant analogizes his argument to *State v. Neeley*, 307 N.C. 247, 252, 297 S.E.2d 389, 393 (1982), in which our Supreme Court held that waiver of a criminal defendant's right to counsel may not be presumed from a silent record.

Since we have already explained that whether defendant was provided the statutory notice did not impact the trial court's subject matter jurisdiction, we find defendant's argument unpersuasive. Consequently, we hold that the trial court properly exercised its subject matter jurisdiction in this case.

Defendant next argues that the trial court violated his right to due process under the state and federal constitutions when it denied defendant's motion to continue since, under the circumstances, he was denied a meaningful opportunity to be heard. However, defendant failed to raise this constitutional issue before the trial court, and, generally, "constitutional issues cannot be raised for the first time on appeal." *State v. Wright*, 200 N.C. App. 578, 584, 685 S.E.2d 109, 114 (2009) (holding due process argument not preserved for appeal when defendant did not raise issue at trial).

We further note that even if defendant's argument were preserved for appeal, he cannot show any prejudice in the denial of his motion to continue. The trial court ordered defendant to enroll in SBM for life based on its finding that defendant was a recidivist. A "'[r]ecidivist'" is "a person who has a prior conviction for an offense that is described in G.S. 14-208.6(4)." N.C. Gen. Stat. § 14-208.6(2b). A "'[r]eportable conviction'" under N.C. Gen. Stat. § 14-208.6(4) includes "[a] final conviction for . . . a sexually violent offense." A "'[s]exually violent offense'" is defined to include both second degree rape and sexual battery. N.C. Gen. Stat. § 14-208.6(5). Defendant does not contest that he was previously convicted of both second degree rape and sexual battery. There is no

dispute, therefore, that he met the statutory definition of a recidivist.

N.C. Gen. Stat. § 14-208.40B(c) provides that "[i]f the court finds that . . . the offender is a recidivist, . . . the court shall order the offender to enroll in satellite-based monitoring for life." Since the trial court had no discretion whether to order defendant to enroll in SBM for life in this case, defendant has failed to show any prejudice from the court's denial of his motion to continue. We nevertheless note that the better practice is for trial courts to grant a defendant's motion to continue in situations when, as here, the defendant's attorney asserts that she had not had an opportunity to meet with the defendant, was given inadequate notice of the hearing, and was unprepared to effectively represent the defendant on the matter set for hearing.

Affirmed.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

Report per Rule 30(e).