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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 15-145

Filed: 15 December 2015

Franklin County, Nos. 06 CRS 4148–52

STATE OF NORTH CAROLINA

v.

BRANDON HOLMES WILDER

Appeal by Defendant from order entered 9 July 2014 by Judge Robert H. Hobgood in Franklin County Superior Court. Heard in the Court of Appeals 20 October 2015.

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

*Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for Defendant-appellant.*

BRYANT, Judge.

Defendant Brandon Holmes Wilder appeals from an order requiring him to enroll in satellite-based monitoring (“SBM”) for a term of 30 years. Because the order fails to present findings of fact sufficient to support a conclusion that the highest level of supervision and monitoring is required and the record fails to provide support for a determination that Defendant is a higher level of risk than the “moderate-high” rating assigned him, we reverse the order.

Factual and Procedural Background

On 29 March 2007, Defendant pled guilty to five counts of taking indecent liberties with a minor. Defendant was sentenced to three consecutive, active terms of 16 to 20 months and two terms of 16 to 20 months which the trial court suspended and placed Defendant on 60 months of supervised probation. Defendant was released from prison on 14 March 2011.

Pursuant to North Carolina General Statutes, section 14-208.40B (“Determination of satellite-based monitoring requirement in certain circumstances”), the trial court held a hearing on 16 December 2013 to determine Defendant’s eligibility for SBM. During the hearing, the State contended that Defendant was a recidivist but failed to submit the results of Defendant’s STATIC-99 risk assessment. The prosecutor stated his belief that Defendant’s STATIC-99 score was “moderate to high,” and Defendant agreed. The only other evidence presented at the hearing was testimony from the victim’s mother detailing the conduct which led to Defendant’s convictions. Following the hearing, the trial court entered an order finding that Defendant was a recidivist and ordering him to enroll in SBM for life, pursuant to N.C. Gen. Stat. § 14-208.40A(c) (“If the court finds that the offender . . . is a recidivist . . . the court shall order the offender to enroll in a satellite-based monitoring program for life.”).

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On 8 January 2014, Defendant filed a “Motion for a New Hearing and for Relief from Order and in the Alternative, Motion for Reconsideration” regarding the SBM order. Defendant argued that the trial court’s imposition of lifetime SBM was erroneous due to the State’s failure to formally submit a STATIC-99 risk assessment at the SBM hearing, and its failure to notify him that the Department of Adult Corrections sought to place him in the recidivist category. Defendant also argued that he was not a recidivist. Defendant did acknowledge that the notice he received indicated the Department sought an order for him to enroll in SBM on the basis that Defendant committed an offense involving the “physical, mental, or sexual abuse of a minor.” The trial court allowed Defendant’s motion and conducted a second SBM hearing on 9 July 2014.

Following the 9 July 2014 SBM hearing, during which the court took judicial notice of the court file and the evidence presented, the court entered a second SBM order in which it found that Defendant had not been convicted of an aggravated offense and that in making its determination as to whether Defendant was a recidivist, the Court considered the Satellite-Based Monitoring Court Eligibility Information Form and the Static-99 Coding form. On these findings, the court concluded that Defendant’s convictions did not establish that he was a recidivist, but did involve the physical, mental, or sexual abuse of a minor. The trial court ordered

that Defendant be subject to satellite-based monitoring for a term of 30 years. Defendant appeals.

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On appeal, Defendant raises the following issues: whether the trial court erred by (I & II) failing to determine Defendant required the highest level of supervision and monitoring; and (III) ordering Defendant to enroll in satellite based monitoring for a term of 30 years.

*I & II*

Defendant first argues that the trial court erred by determining he required the highest level of supervision and monitoring. Specifically, Defendant contends that absent other findings of fact the Division of Adult Correction's risk assessment alone fails to support the trial court's determination that he required the highest level of supervision and monitoring pursuant to General Statutes section 14-208.40B. We agree.

"We will . . . review the trial court's order to ensure that the determination that defendant requires the highest possible level of supervision and monitoring reflects a correct application of law to the facts found." *State v. Kilby*, 198 N.C. App. 363, 366–67, 679 S.E.2d 430, 432 (2009) (citation and quotations omitted). "In reviewing a trial judge's findings of fact, we are strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they

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are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.” *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation and quotations omitted). “[W]e review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.” *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004) (citation and quotations omitted).

Pursuant to North Carolina General Statutes, section 14-208.40B (“Determination of satellite-based monitoring requirement in certain circumstances”),

[i]f the Division of Adult Correction determines that the offender falls into one of the categories described in G.S. 14-208.40(a) [(codified within our General Statutes, Chapter 14, Subchapter VII, Article 27A (“Sex Offender and Public Protection Registration Programs), Part 5 (Sex Offender Monitoring)], the district attorney . . . shall schedule a hearing in superior court for the county in which the offender resides.

N.C. Gen. Stat. § 14-208.40B(b) (2013).

The court shall hold the hearing and make findings of fact pursuant to G.S. 14-208.40A.

. . .

If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, . . . the court shall order that the Division of Adult Correction do a risk assessment of the offender. . . .

Upon receipt of a risk assessment from the Division of

Adult Correction, the court shall determine whether . . . the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.

*Id.* § 14-208.40B(c).

In *State v. Kilby*, the defendant challenged a trial court order compelling him to enroll in an SBM program for a period of five to ten years. 198 N.C. App. 363, 679 S.E.2d 430 (2009). The defendant argued that the trial court’s findings of fact failed to support its conclusion that “the highest possible level of supervision and monitoring” was required. *Id.* at 366, 679 S.E.2d at 432. The Department of Corrections had performed a risk assessment of the defendant and determined that he was “a moderate level risk.” *Id.* at 369, 679 S.E.2d at 434. And the State presented no additional evidence “which tends to indicate that defendant poses a greater than ‘moderate’ risk or which would demonstrate that ‘defendant requires the highest possible level of supervision and monitoring’” by DOC. *Id.* at 370, 679 S.E.2d at 434. The Court acknowledged evidence that the defendant was fully cooperating with his post-release supervision, which was more indicative of a lower risk level than a higher one. *Id.* The *Kilby* Court reasoned that no evidence supported a finding of a higher level of risk than the “moderate” risk level assessment. Accordingly, the *Kilby* Court reversed the trial court order requiring SBM. *Id.*; see also *State v. Causby*, 200 N.C.

App. 113, 683 S.E.2d 262 (2009) (reversing the trial court’s order for SBM where DOC assessed the defendant as a moderate risk and the State failed to present evidence in support of the determination that the defendant requires the highest possible level of supervision and monitoring).

Here, initially, we note that the State concedes the trial court committed reversible error by ordering Defendant to enroll in an SBM program when it failed to make findings of fact in addition to Defendant’s risk assessment score of “moderate to high.”

In its 9 July 2014 SBM order, the trial court made three findings of fact: taking indecent liberties with a child was not an aggravated offense; Defendant was convicted of taking indecent liberties with a child; and in its determination of whether Defendant was a recidivist as defined by N.C. Gen. Stat. § 14-208.6(2b), the court considered the approach taken on the Satellite-Based Monitoring Court Eligibility Information Form and the Static-99 Coding Form.<sup>1</sup> The Static-99 Form assessing

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“The STATIC–99 Risk Assessment is an actuarial instrument designed to estimate the probability of sexual and violent recidivism among male offenders who have already been convicted of at least one sexual offense against a child or non-consenting adult.” N.C. Dep’t of Correction Policies–Procedures, No. VII.F Sex Offender Management Interim Policy 9 (2007). The Department of Correction uses the STATIC–99 risk assessment to determine levels of supervision required for offenders. *Id.* The STATIC–99 factors include: (1) the age of the offender, (2) whether the offender has “ever lived with a lover for at least two years[,]” (3) non-sexual violence convictions, (4) prior sexual offense charges and convictions, (5) prior sentencing dates, (6)

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Defendant reflects a score of “Moderate-High.”<sup>2</sup> As the trial court’s only finding of fact referencing Defendant’s risk factor indicates that Defendant’s risk is within the moderate range, we hold, in accordance with *Causby* and *Kilby*, that the trial court erred in concluding Defendant was subject to the highest level of supervision and monitoring, satellite-based monitoring, for a period of 30 years.

The question now is whether the trial court’s order is to be reversed or reversed and remanded for further proceedings. In *State v. Morrow*, this Court reasoned that

[i]f the State presented no evidence which would tend to support a determination of a higher level of risk than the “moderate” rating assigned by the DOC, then the order requiring defendant to enroll in SBM should be reversed. However, if evidence supporting the trial court’s determination of a higher level of risk is presented, it is proper to remand this case to the trial court to consider the evidence and make additional findings.

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convictions for non-contact sex offenses, (7) any unrelated victims, (8) stranger victims, or (9) male victims.

*State v. Morrow*, 200 N.C. App. 123, 125 n.3, 683 S.E.2d 754, 757 n.3, *writ denied, review denied*, 363 N.C. 747, 689 S.E.2d 372 (2009), *aff’d*, 364 N.C. 424, 700 S.E.2d 224 (2010).

<sup>2</sup> The sum of Defendant’s individual risk factors totaled 4. According to the form, Static-99R individual risk scores were translated into the following risk categories:

Score	Label for Risk Category
-3 through 1	Low
2, 3	Moderate-Low
4, 5	Moderate-High
6 plus	High

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200 N.C. App. 123, 132, 683 S.E.2d 754, 761 (citation and quotations omitted), *writ denied, review denied*, 363 N.C. 747, 689 S.E.2d 372 (2009) and *aff'd*, 364 N.C. 424, 700 S.E.2d 224 (2010).

Upon review of the record, including the testimony presented during the SBM hearings held on 16 December 2013 and 9 July 2014, Defendant has been cooperative with the terms of his probation and has not been convicted of a new offense since his first conviction. Therefore, we find no evidence which would support a finding of a higher level of risk than the “moderate-high” rating assigned by the Department of Adult Corrections assessed on Defendant’s Static-99R form. *See id.* Accordingly, we reverse the trial court’s 9 July 2014 SBM compelling Defendant to enroll in a satellite based monitoring program for a period of 30 years.

REVERSED.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).