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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-303

Filed: 17 November 2015

Haywood County, No. 03 CRS 52874

STATE OF NORTH CAROLINA

v.

KEITH WAYNE CARVER

Appeal by Defendant from order entered 14 October 2014 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 2 November 2015.

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

Ryan McKaig for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Keith Wayne Carver (“Defendant”) appeals from a 14 October 2014 order directing him to enroll in satellite-based monitoring (“SBM”) for the remainder of his natural life. Defendant contends that the SBM order violates the *ex post facto* clauses of the United States and North Carolina Constitution. We disagree and affirm the trial court’s order.

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On 17 February 2004, Defendant pled guilty to second degree rape and second degree burglary. The trial court found him to be a prior record level V for sentencing purposes and sentenced him to a term of 121 to 155 months' imprisonment.

On 30 May 2014, the North Carolina Department of Public Safety, Division of Adult Correction, sent a letter to Defendant informing him that he was required to appear at a hearing to determine his eligibility for SBM. On 14 October 2014, the trial court held the SBM-eligibility hearing and found that Defendant "falls into at least one of the categories requiring [SBM] under G.S. 14-208.40, in that" Defendant was convicted of an aggravated offense. The court then ordered Defendant to be enrolled in SBM for the remainder of his natural life.

Defendant gave oral notice of appeal at the SBM hearing. However, this Court previously "has held that SBM hearings and proceedings are not criminal actions, but are instead a 'civil regulatory scheme'" and thus oral notice of appeal is insufficient. *State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010). "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 195, 693 S.E.2d at 206 (internal quotation marks and brackets omitted). "N.C.R. App. P. 3(a) [] provides that appeals to the appellate courts in civil actions and special proceedings are required to be in writing, filed with the Clerk of Superior Court, and served upon all other parties." *State v. Cowan*, 207 N.C. App. 192, 195, 700 S.E.2d 239, 241 (2010).

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Because Defendant failed to give written notice of appeal as required by N.C.R. App. P. 3, he filed a petition for writ of certiorari with this Court. “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) (2014). As evidenced by his improper oral notice of appeal, it is clear that Defendant intended to appeal the SBM order, and his failure to timely file written notice of appeal was through no fault of his own. Therefore, we allow Defendant’s petition for writ of certiorari.

On appeal, Defendant concedes that he qualifies for lifetime SBM under the existing statute based on his conviction for an aggravated offense. *See* N.C. Gen. Stat. § 14-208.40(a)(1) (2013). His only argument is that North Carolina’s SBM scheme violates the *ex post facto* clauses of both the United States and North Carolina Constitutions. Defendant acknowledges that our Supreme Court previously addressed this exact issue in *State v. Bowditch*, 364 N.C. 335, 700 S.E.2d 1 (2010), and that we are bound by that holding, but “makes his argument as a preservation argument in the event that the United States Supreme Court ultimately determines that the [SBM] scheme is an unconstitutional *ex post facto* punishment.” In *Bowditch*, our Supreme Court held that the SBM program was created as a “civil, regulatory scheme” and “does not violate the Ex Post Facto Clauses of the state or

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federal constitution.” *Id.* at 352, 700 S.E.2d at 13. Based on this holding, we must affirm the trial court’s order. *See Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (holding that this Court has a “responsibility to follow” decisions issued by our Supreme Court).

For the foregoing reasons, we

AFFIRM.

Chief Judge McGee and Judge Dillon concur.

Report per Rule 30(e).