IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-775

Filed: 17 May 2016

Martin County, Nos. 12 CRS 51372, 13 CRS 126

STATE OF NORTH CAROLINA

v.

CHRISTOPHER RAY LUCKADOO

Appeal by defendant from judgments entered 25 September 2013 and order entered 6 January 2015 by Judge Wayland J. Sermons, Jr. in Martin County Superior Court. Heard in the Court of Appeals 30 November 2015.

Roy Cooper, Attorney General, by Belinda A. Smith, Special Deputy Attorney General, for the State.

W. Michael Spivey for defendant-appellant.

DAVIS, Judge.

Christopher Ray Luckadoo ("Defendant") appeals from his convictions for taking indecent liberties with a child and contributing to the delinquency of a juvenile. On appeal, he contends that the trial court erred by (1) failing to accurately determine his prior record level during sentencing; and (2) ordering that he be enrolled in satellite-based monitoring ("SBM") for a period of 20 years. After careful

review, we (1) remand for a new sentencing hearing; and (2) affirm the trial court's SBM order.

Factual Background

On 25 September 2013, Defendant was convicted by a jury in Martin County Superior Court before the Honorable Wayland J. Sermons, Jr. of taking indecent liberties with a child and contributing to the delinquency of a juvenile. The trial court sentenced Defendant to consecutive sentences of 27 to 42 months imprisonment on the offense of taking indecent liberties with a child and 120 days imprisonment on the offense of contributing to the delinquency of a juvenile. Defendant did not give notice of appeal. However, on 29 December 2014 this Court granted Defendant's petition for *certiorari* seeking review of the judgments resulting from his convictions.

On 7 January 2014, the trial court held a hearing to determine Defendant's eligibility for SBM. The court ordered that Defendant be enrolled in SBM for the remainder of his natural life, and Defendant appealed. We subsequently vacated the SBM order and remanded for a new SBM hearing. *State v. Luckadoo*, __ N.C. App. __, 767 S.E.2d 151 (2014) ("*Luckadoo I*").

On remand, the trial court held another SBM hearing on 5 January 2015 and issued an order the following day requiring that Defendant be enrolled in SBM for a term of 20 years. Defendant gave oral notice of appeal from the trial court's 6 January 2015 SBM order and on 14 August 2015 filed a petition for writ of *certiorari* seeking

our review of the SBM order through the exercise of our *certiorari* power even if his oral notice of appeal was found to be defective.

Analysis

I. Prior Record Level

In his first argument on appeal, Defendant contends that the trial court erred in calculating his prior record level because it improperly concluded that Defendant's prior conviction in Virginia for the offense of sexual battery was substantially similar to a conviction for sexual battery under North Carolina law. We review this issue *de novo*. *See State v. Fortney*, 201 N.C. App. 662, 669, 687 S.E.2d 518, 524 (2010) ("[T]he question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law requiring *de novo* review on appeal." (citation and quotation marks omitted)).

Before imposing a sentence for a felony conviction, the trial court must determine the defendant's prior record level. N.C. Gen. Stat. § 15A-1340.13(b) (2015). The prior record level is calculated by adding together the points assigned to each of the defendant's qualifying prior convictions. N.C. Gen. Stat. § 15A-1340.14(a) (2015). One point is assigned for each Class A1 or Class 1 nontraffic misdemeanor offense. N.C. Gen. Stat. § 15A-1340.14(b)(5). Generally, a misdemeanor conviction from another jurisdiction is classified as a Class 3 misdemeanor, and no sentencing points are assigned for Class 3 misdemeanor convictions. *See* N.C. Gen. Stat. § 15A-

1340.14(b), (e). However, "[i]f the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points." N.C. Gen. Stat. § 15A-1340.14(e). If that occurs, one point is added to the total of the defendant's prior record points. *See* N.C. Gen. Stat. § 15A-1340.14(b)(5).

The "determination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014) (citation, quotation marks, and brackets omitted). "[T]he party seeking the determination of substantial similarity must provide evidence of the applicable law." *Id.* at 719, 766 S.E.2d at 333. The submission of a copy of the applicable statute from the other state constitutes such evidence. *See* N.C. Gen. Stat. § 8-3 (2015).

In the present case, the State sought to demonstrate that Defendant's conviction in Virginia for sexual battery pursuant to Va. Code Ann. § 18.2-67.4 (which is classified under Virginia law as a misdemeanor) was substantially similar to the offense of sexual battery in North Carolina under N.C. Gen. Stat. § 14-27.33 — a Class A1 misdemeanor. The State provided the trial court with a copy of Va. Code

Ann. § 18.2-67.4, which defines the offense of sexual battery under Virginia law. However, that statute, in turn, references a *separate* Virginia statute — Va. Code Ann. § 18.2-67.10 — that defines the phrase "sexual abuse" for purposes of Va. Code Ann. § 18.2-67.4. The State did not provide the trial court with a copy of Va. Code Ann. § 18.2-67.10, and there is no indication in the record that the court reviewed that statute in the course of its determination as to whether Defendant's out-of-state conviction was substantially similar to the offense of sexual battery under North Carolina law.

Our Supreme Court's recent decision in *Sanders* directly addresses this issue. In *Sanders*, the trial court was required to determine whether the offense of domestic assault under Tennessee law was substantially similar to the offense of assault on a female under North Carolina law. *Sanders*, 367 N.C. at 716-17, 766 S.E.2d at 331. The Tennessee statute at issue — Tenn. Code Ann. § 39-13-111 — provided that "[a] person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim." Tenn. Code Ann. § 39-13-111(b). The State offered into evidence a copy of Tenn. Code Ann. § 39-13-111 but did not provide a copy of Tenn. Code Ann. § 39-13-101, and there was no indication in the record that the trial court ever reviewed Tenn. Code Ann. § 39-13-101. *Sander*s, 367 N.C. at 719, 766 S.E.2d at 333. The Supreme Court held that

> it was error for the trial court to determine that Tenn. Code Ann. § 39-13-111 was substantially similar to a North

> Carolina offense without reviewing Tenn. Code Ann. § 39-13-101, which is explicitly referenced by Tenn. Code Ann. § 39-13-111 and defines Tennessee's statutory elements of assault.

Id.

In light of *Sanders*, we hold that the trial court in the present case similarly erred in determining that the offense of sexual battery under Va. Code Ann. § 18.2-67.4 was substantially similar to the North Carolina offense of sexual battery without reviewing Va. Code Ann. § 18.2-67.10. Moreover, we believe it is appropriate under these circumstances to remand this case to the trial court for a new substantial similarity determination as opposed to this Court conducting such a determination itself. The issue of whether the offense of sexual battery under Virginia law — taking into account *both* Va. Code Ann. §§ 18.2-67.4 and 18.2-67.10 — is substantially similar to the offense of sexual battery under North Carolina law has not been fully briefed by the parties in this Court. Defendant's brief focuses on the trial court's error in failing to review Va. Code Ann. § 18.2-67.10 and seeks a remand on that ground without asking this Court to conduct its own substantial similarity determination. The State's brief contains only a cursory analysis comparing the two offenses, and while the State seeks affirmance of the trial court's ruling, it requests, in the alternative, that we "remand to the trial court for a fuller on-the-record analysis of the substantial similarity [issue]."

While we express no opinion on the ultimate issue of whether the two offenses

are, in fact, substantially similar, we note that *Sanders* — which had not been decided by the Supreme Court at the time the trial court originally sentenced Defendant — provides guidance in several respects regarding the manner in which the substantial similarity comparison should be conducted by the trial court on remand. First, in *Sanders* the Supreme Court declined to accept the State's invitation to "look beyond the elements of the offenses and consider (1) the underlying facts of defendant's out-of-state conviction, and (2) whether, considering the legislative purpose of the respective statutes defining the offenses, the North Carolina offense is 'suitably equivalent' to the out-of-state offense." *Id.* at 719, 766 S.E.2d at 333.

Instead, the Supreme Court held that the "determination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving *comparison of the elements* of the out-of-state offense to those of the North Carolina offense." *Id.* at 720, 766 S.E.2d at 334 (citation, quotation marks, and brackets omitted and emphasis added). Therefore, in the present case, the trial court on remand must look only at the elements of the offenses at issue under North Carolina and Virginia law in making its substantial similarity determination.

Second, we note that in holding the North Carolina and Tennessee offenses before the court in *Sanders* were not substantially similar, the Supreme Court's analysis focused on the fact that certain types of conduct would violate the Tennessee statute but not the North Carolina statute and vice versa.

> Indeed, a woman assaulting her child or her husband could be convicted of "domestic assault" in Tennessee, but could not be convicted of "assault on a female" in North Carolina. A male stranger who assaults a woman on the street could be convicted of "assault on a female" in North Carolina, but could not be convicted of "domestic assault" in Tennessee.
>
> We therefore hold that the trial court erred in determining the two offenses to be substantially similar.

Id. at 721, 766 S.E.2d at 334.

However, it must also be noted that *Sanders* does not change the well-settled principle that an out-of-state conviction need not be *identical* in all respects to a North Carolina offense in order for a finding of substantial similarity to be made. *See State v. Sapp*, 190 N.C. App. 698, 713, 661 S.E.2d 304, 312 (2008) ("[T]he requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is not that the statutory wording precisely match, but rather that the offense be 'substantially similar.' "), *appeal dismissed and disc. review denied*, 363 N.C. 661, 685 S.E.2d 799 (2009). Accordingly, we remand this case for a new sentencing hearing and direct the trial court to conduct a substantial similarity determination in conformity with the principles set out herein.

II. SBM Order

In his final argument on appeal, Defendant contends that following the issuance of this Court's opinion in *Luckadoo I*, the trial court abused its discretion by ordering that Defendant be enrolled in SBM for a period of 20 years. Defendant's

counsel gave oral notice of appeal following the 5 January 2015 hearing but failed to file a written notice of appeal as to the SBM order.

Because SBM hearings are civil proceedings, oral notice of appeal is insufficient to confer jurisdiction upon this Court. *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010). Rather, a defendant must give written "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 (citation, quotation marks, and brackets omitted). However, this Court may, in its discretion, issue a writ of *certiorari* "when the right to prosecute an appeal has been lost by failure to take timely action." N.C.R. App. P. 21(a)(1). In our discretion, we elect to grant Defendant's petition for writ of *certiorari* and address the merits of his SBM argument.

In *Luckadoo I*, we explained our rationale for holding that the trial court had erred in imposing a lifetime term of SBM as follows:

> Under the framework of N.C. Gen. Stat. § 14-208.40B, a trial court is required to first determine whether the defendant was convicted of a reportable offense. If the trial court finds that the defendant was convicted of a reportable offense, then the trial court must determine whether the defendant falls into one of the following four categories: "(i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, or (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A[.]" N.C. Gen. Stat. § 14-208.40B(c). If the trial court finds that the defendant falls into one of these categories, the trial court "shall order the offender to enroll in satellite-based

monitoring for life." *Id*.

If the trial court determines that the defendant does not fall into one of those four categories, but "committed an offense that involved the physical, mental, or sexual abuse of a minor," the trial court is required to order the Division of Adult Correction to complete a risk assessment on the offender. *Id*. Upon receipt of the risk assessment, the court must determine whether, based on the risk assessment, "the offender requires the highest possible level of supervision and monitoring." *Id*. If the court determines that the defendant does require the highest level of 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*.

Here, the trial court correctly found that taking indecent liberties with a child is a reportable offense as defined by N.C. Gen. Stat. § 14-208.6(4) (2013) and that the offense involved the physical, mental, or sexual abuse of a minor. However, defendant does not fall into any of the categories requiring lifetime monitoring. Specifically, the trial court did not find that defendant was a recidivist or a sexually violent predator. Additionally, defendant was not convicted of a violation of N.C. Gen. Stat. § 14-27.2A or -27.4A (2013). Further, this Court has previously held that taking indecent liberties with a child is not an aggravated offense pursuant to N.C. Gen. Stat. 14-208.6(1a). *See State v. Davison*, 201 N.C. App. 354, 361, 689 S.E.2d 510, 515 (2009). Therefore, the trial court erred in ordering defendant to enroll in SBM for the remainder of his natural life.

We note that defendant does not contest the risk assessment or that he is required to enroll in SBM for a definite term of years. Because the trial court has already found (1) that defendant committed an offense involving the physical, mental, or sexual abuse of a minor; (2) that defendant is "high risk" based on his "STATIC-99" assessment; and (3) that defendant requires the highest

> level of supervision and monitoring, the only issue left for the trial court to determine is the specific period of time for which defendant is required to enroll in SBM. *See* N.C. Gen. Stat. § 14-208.40A(e) (2013). Accordingly, we vacate the order of the trial court and remand the case for further proceedings consistent with this opinion.

Luckadoo I, 767 S.E.2d 151, slip op. at 3-5.

In his present appeal, Defendant argues that the trial court's determination on remand that he be subjected to SBM for a period of twenty years was an abuse of discretion. We reject this argument as our review of the record leads us to conclude that the court's decision was well within its discretion.

N.C. Gen. Stat. § 14-208.40B(c) states, in pertinent part, as follows:

> 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*.

N.C. Gen. Stat. § 14-208.40B(c) (2015) (emphasis added).

Here, before making its determination at the 5 January 2015 hearing as to the specific number of years for which Defendant would be enrolled in SBM, the trial court sought input from all parties. The State requested that a period of 30 years be imposed, citing a statute pertaining to registration requirements for sex offenders, N.C. Gen. Stat. § 14-208.6A, which states that "[i]t is the objective of the General Assembly to establish a 30-year registration requirement for persons convicted of certain offenses against minors or sexually violent offenses . . . ." N.C. Gen. Stat. §

14-208.6A (2015).

After first acknowledging that the ultimate determination as to the number of years of SBM enrollment was within the trial court's discretion, Defendant's attorney — without further elaboration — requested a period of 10 years. The trial court then asked whether Defendant wanted the opportunity to provide input, and Defendant responded, "I just -- whatever your discretion is." The trial court then stated the following:

> All right. All right. Based upon all of the facts -- the Court was the trial judge in this matter. Based upon all the facts but based upon the determination of the static 99, the Court is going to order that the defendant be subject to satellite-based monitoring for a term of -- number B, the time period will be twenty years, and that will be the new SBM finding.

The only issue properly before this Court in connection with the 6 January 2015 SBM order is whether the trial court's imposition of a 20-year period of SBM was an abuse of discretion.[1] "The test for abuse of discretion is whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Beard v. WakeMed*, 232 N.C. App. 187, 193, 753 S.E.2d

[1] In his brief, Defendant argues that the General Assembly's failure to include in N.C. Gen. Stat. § 14-208.40B(c) factors for the trial court to expressly consider in making this determination raises due process and equal protection concerns. However, we will not consider these constitutional arguments as Defendant did not raise them at the trial court, and it is well settled that "[t]he failure to raise a constitutional issue before the trial court bars appellate review." *State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003); *see also State v. Mills*, 232 N.C. App. 460, 466, 754 S.E.2d 674, 678 ("Our appellate courts will only review constitutional questions raised and passed upon at trial."), *disc. review denied*, 367 N.C. 517, 762 S.E.2d 210 (2014).

708, 712-13 (2014) (citation omitted).

Here, Judge Sermons, who also presided over Defendant's trial and sentencing, made his determination on this issue based on the entire record (including Defendant's STATIC-99) and only after hearing arguments of counsel for both the State and Defendant. Moreover, the period of years he ultimately imposed fell squarely between the terms of years suggested by the prosecutor (30 years) and by defense counsel (10 years). Based upon all of the circumstances, we are unable to conclude that Judge Sermons' ruling was "manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Id.* Accordingly, Defendant's argument on this issue is overruled.

Conclusion

For the reasons stated above, we (1) remand for a new sentencing hearing not inconsistent with this opinion; and (2) affirm the trial court's 6 January 2015 SBM order.

AFFIRMED IN PART; REMANDED FOR NEW SENTENCING HEARING.

Chief Judge McGEE and Judge DILLON concur.

Report per Rule 30(e).