IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1400

Filed: 16 October 2018

Caldwell County, No. 13 CRS 538

STATE OF NORTH CAROLINA

v.

KEITH DAVIS TURNER

Appeal by Defendant from order entered 15 January 2014 by Judge C. Thomas Edwards in Superior Court, Caldwell County. Heard in the Court of Appeals 17 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General William H. Harkins, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Defendant.

McGEE, Chief Judge.

Keith Davis Turner ("Defendant") appeals from order entered 15 January 2014 imposing lifetime satellite-based monitoring ("SBM"). Defendant argues the trial court lacked subject-matter jurisdiction to enter the 15 January 2014 order. Because the State did not make a proper motion that would enable the trial court to review

its previous SBM order, we agree with Defendant that the trial court lacked jurisdiction.

I. Factual and Procedural History

Defendant was indicted on 1 April 2013 for statutory rape of a thirteen-to-sixteen-year-old and contributing to the delinquency of a minor. Defendant pleaded guilty to both counts on 30 October 2013, and stipulated to having a prior record level of I. The State agreed to a consolidated sentence and further agreed not to seek additional charges based on the facts underlying Defendant's plea. Defendant was sentenced to 144 months to 185 months of incarceration.

The State argued that statutory rape constituted an aggravated offense, which would require Defendant to enroll in lifetime SBM. In support thereof, the State argued before the trial court that *State v. Sprouse*, 217 N.C. App. 230, 719 S.E.2d 234 (2011) applied. The trial court stated that its interpretation of *Sprouse* was that statutory rape only constituted an aggravated offense if the victim was under the age of twelve years old. The State responded that it agreed with the trial court's interpretation. The trial court then held that, because Defendant's offense constituted a sexually violent offense, a risk assessment needed to be performed before it could determine if lifetime SBM was required.

Based on the risk assessment performed by the Division of Adult Correction, Defendant was placed in the "Moderate-Low" risk category. The trial court entered

an order on 30 October 2013 stating that Defendant did "not require the highest possible level of supervision and monitoring" and was not required to enroll in SBM. Neither party appealed the trial court's order.

Another SBM hearing was held on 13 January 2014. The record on appeal does not contain any information indicating how the 13 January 2014 hearing was initiated. The transcript of the 13 January 2014 hearing consists of less than two pages in which the State argued the trial court had misinterpreted *Sprouse* at the 30 October 2013 hearing and that Defendant's statutory rape conviction was an aggravated offense requiring lifetime SBM. The trial court set aside the 30 October 2013 order and imposed lifetime SBM in a 15 January 2014 order. Neither party appealed the 15 January 2014 order.

The North Carolina Department of Public Safety notified the Caldwell County Clerk of Superior Court on 30 June 2017 that there had been an error in Defendant's sentencing, as his maximum sentence did not correspond to the minimum sentence imposed. The trial court held a hearing on 24 July 2017 regarding the sentencing error and increased Defendant's maximum sentence from 185 months to 233 months of incarceration. Defendant filed a *pro se* notice of appeal on 28 July 2017, arguing that amending the maximum sentence to a duration above that in his plea agreement violated his due process rights.

Having recognized that he had lost his right to appeal the 15 January 2014 order, Defendant filed a petition for writ of *certiorari* to review that order on 10 January 2018. Defendant withdrew his *pro se* appeal on 26 January 2018. This Court allowed Defendant's petition for writ of *certiorari* on 1 March 2018, for the limited purpose of reviewing Judge Edwards' 15 January 2014 order.

II. Analysis

"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.'" *In re T.R.P.*, 360 N.C. 588, 590, 616 S.E.2d 924 (2005) (quoting *Black's Law Dictionary* 856 (7th ed. 1999)). "'A court cannot undertake to adjudicate a controversy on its own motion . . . before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.'" *In re T.R.P.*, 173 N.C. App. 541, 543, 619 S.E.2d 525, 527 (2005) (quoting *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 793 (2003)). "'[T]he proceedings of a court without jurisdiction of the subject matter are a nullity.'" *T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (quoting *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964)).

Because jurisdiction concerns a trial court's inherent authority to act, "a defense based upon lack of subject matter 'cannot be waived and may be asserted at any time. Accordingly, the appellants may raise the issue of jurisdiction over the matter for the first time on appeal although they initially failed to raise the issue

before the trial court.'" *T.R.P.*, 173 N.C. App. at 543-44, 619 S.E.2d 525, 527 (quoting *In re Green*, 67 N.C. App. 501, 504, 313 S.E.2d 193, 195 (1984)). Therefore, the State's argument that "the unquestionable consent by Defendant's trial counsel strips the [trial court's] error of any prejudice," is unavailing if the trial court's error caused it to lack jurisdiction over the proceeding.

"[F]or certain statutorily created causes of action, a trial court's subject-matter jurisdiction over the action does not fully vest unless the action is properly initiated." *Matter of Wolfe*, ___ N.C. App. ___, ___, 803 S.E.2d 649, 652 (2017) (citing *T.R.P.*, 360 N.C. at 591-93, 636 S.E.2d at 790-92). SBM hearings are statutorily created. *See State v. Jarvis*, 214 N.C. App. 84, 89-91, 715 S.E.2d 252, 256-57 (2011) ("[O]ur 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*." (emphasis added)). Article 27A of the North Carolina General Statutes governs the procedures for the sex offender registration and monitoring. N.C. Gen. Stat. § 14-280.40A outlines the process for determining whether SBM should be imposed on a criminal defendant at sentencing. N.C. Gen. Stat. § 14-280.40B outlines the procedure for when a trial court fails to make a determination regarding SBM during sentencing. Therefore, before a trial court has jurisdiction over a SBM hearing, the SBM hearing must be properly initiated under Article 27A.

In *State v. Clayton*, 206 N.C. App. 300, 305-06, 697 S.E.2d 428, 432 (2010), this Court held that "[t]he SBM statutes do not provide for reassessment of [a] defendant's SBM eligibility based on the same reportable conviction, after the initial SBM determination is made based on that conviction." Instead, a subsequent hearing on SBM eligibility is available only where "the trial court has not previously determined whether the offender must be required to enroll in SBM." *Id.* at 306, 697 S.E.2d at 433 (citing *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432-33 (2009)). Here, as in *Clayton*, "[t]he record contains no indication that . . . [D]efendant was convicted of another 'reportable conviction' which could trigger another SBM hearing based upon the new conviction . . . . Therefore, the trial court did not have jurisdiction to conduct the [second] SBM hearing." *Id.* at 305, 697 S.E.2d at 432.

The trial court's reading of *Sprouse* at the initial SBM hearing was incorrect. *See Sprouse*, 217 N.C. App. at 240, 719 S.E.2d at 242 ("[T]he State argues that a statutory rape offense . . . is also an 'aggravated offense' because statutory rape requires the victim to be 13, 14, or 15 years old, and therefore statutorily incapable of consenting as a matter of law. We agree[.]"). However, once the trial court entered the erroneous order, it did not have the authority to *sua sponte* modify the prior order. *See Clayton*, 206 N.C. App. at 305-306, 697 S.E.2d at 432. Instead, the State was required to appeal the erroneous order to correct the mistake of law. *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 676, 360 S.E.2d 772, 777 (1987) ("An

erroneous order is one rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles. An erroneous order may be remedied by appeal; it may not be attacked collaterally." (internal citations and quotations omitted)).

The State contends other options were available under N.C. Gen. Stat. § 1A-1, Rule 59(a)(1) (2017), N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017), or N.C. Gen. Stat. § 15-1416(a) (2017) to seek review of the erroneous order. The record on appeal does not contain any motion filed by the State under any of these provisions. "In making our review and reaching our determination upon the facts of a particular case, we can judicially know only what appears of record on appeal and will not speculate as to matters outside the record." *State v. Branch*, 306 N.C. 101, 105, 291 S.E.2d 653, 657 (1982).

Defendant served his proposed record on appeal on the State on 31 October 2017 and the record was settled on 19 December 2017 when the State did not approve, reject, or attempt to amend the record. Defendant acknowledged, and the State concedes, that "the [trial] court clerk's file . . . does not include any motion, notice, or other written request by the state indicating how the 13 January 2014 hearing was initiated." The State has had ample opportunity to amend the record on appeal to include the document that triggered the 13 January 2014 hearing, but has failed to do so. N.C. R. App. P. 9(b)(5)(a) ("If the record on appeal as settled is insufficient to

respond to the issues presented in an appellant's brief . . . , the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9.").

III. Conclusion

We need not speculate about whether any hypothetical motions could have granted the trial court subject-matter jurisdiction to enter the 15 January 2014 order. In the absence of any motion, the trial court lacked subject-matter jurisdiction to conduct the 13 January 2014 hearing and the 15 January 2014 order is void.

VACATE.

Judges CALABRIA and DIETZ concur.

Report per Rule 30(e).