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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-24

Filed: 2 October 2018

New Hanover County, Nos. 16 CRS 57782-83

STATE OF NORTH CAROLINA

v.

DANIEL JAY GUERRETTE

Appeal by Defendant from order entered 15 August 2017 by Judge Jay D. Hockenbury in Superior Court, New Hanover County. Heard in the Court of Appeals 20 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Regina T. Cucurullo, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for Defendant.

McGEE, Chief Judge.

Daniel Jay Guerrette ("Defendant") pleaded guilty to two counts of secretly peeping using a photographic device to view the body or undergarments of another person pursuant to N.C. Gen. Stat. § 14-202(e) (2017), two counts of creating a photographic image while secretly peeping pursuant to N.C.G.S. § 14-202(d), two counts of knowingly possessing a photographic image created through secretly

peeping pursuant to N.C.G.S. § 14-202(g), and attaining the status of an habitual felon. Defendant was sentenced to a minimum of twenty-six months and a maximum of forty-four months of incarceration and was ordered to be placed on the sex offender registry for thirty years. Defendant appeals from the trial court's order imposing sex offender registration.

I. Factual and Procedural History

Defendant pleaded guilty on 15 August 2017 to the six offenses, which were committed on 4 July 2016. Defendant entered a public women's restroom in Carolina Beach on 4 July 2016 and remained in the restroom for approximately eight minutes. While in the restroom, Defendant used his cellphone to film six women who were using the restroom. One of the women saw Defendant filming her and chased him from the restroom before alerting nearby police officers. The officers quickly located and detained Defendant. Before being apprehended, Defendant attempted to dispose of his cellphone, which contained the videos he had taken in the restroom, by throwing the cellphone into a hole.

After accepting Defendant's plea, the trial court heard arguments from Defendant before sentencing. Defendant explained his history of mental illness, which included diagnoses for schizophrenia, schizoaffective disorder, bipolar tied to social anxiety disorder, panic disorder, and post-traumatic stress disorder. Defendant further admitted that, during the time of the incident, he was intoxicated

and was not taking his prescribed medication. The trial court sentenced Defendant to a minimum of twenty-six months and a maximum of forty-four months of incarceration.

The trial court then heard arguments as to whether Defendant should be required to register as a sex offender after his release from incarceration. In support of requiring that Defendant register as a sex offender, the State informed the trial court that Defendant had twenty prior felony convictions and recounted the events of the present convictions. Defendant responded that none of the previous convictions involved violence. There was no indication from either the State or Defendant that any of the previous offenses were sexual in nature. The trial court found that:

> [T]his [D]efendant, after having been convicted of some 20 felonies and reaching an habitual felon status, [went] into a public restroom in Carolina Beach with a camera and secretly [took] videos . . . of women in the bathroom going to the bathroom, and after pleading guilty to six charges of these offenses . . . that these are offenses that pose significant and unacceptable threats to public safety[.]
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> . . . .
>
> [D]efendant by his convictions today is a danger to the community[.]

The trial court ordered Defendant to register as a sex offender for a period of thirty years, which Defendant appeals.

II. Analysis

Defendant's sole argument on appeal is that the trial court erred in determining that Defendant was a danger to the community and, therefore, required Defendant to register as a sex offender. We agree.

When a person is convicted under N.C.G.S. § 14-202(d), (e), (f), (g), or (h), the trial court must determine whether that person is a danger to the community and whether requiring the person to register as a sex offender furthers the purpose of the sex offender registration program. N.C.G.S. § 14-202(l). Defendant does not argue requiring him to register as a sex offender would not further the purpose of the sex offender registration program. Therefore, the only issue this Court must address is whether Defendant is a danger to the community. N.C. R. App. P. 28. A "'danger to the community' refers to those sex offenders who pose a risk of engaging in sex offenses following release from incarceration[.]" *State v. Pell*, 211 N.C. App. 376, 379, 712 S.E.2d 189, 191 (2011). When reviewing a trial court's determination that a defendant poses a "danger to the community," "this Court will review the trial court's findings to ensure that they are supported by competent evidence, and we review the conclusions of law to ensure that they reflect a correct application of law to the facts." *Pell*, 211 N.C. App. at 380-81, 712 S.E.2d at 192 (citing *State v. Kilby*, 198 N.C. App. 363, 367, 678 S.E.2d 430, 432 (2009)).

Defendant argues there was not competent evidence to support a conclusion that he was a danger to the community. Specifically, Defendant argues the evidence

failed to show that Defendant poses a risk of committing sex offenses upon his release from incarceration.

Pursuant to N.C.G.S. § 14-202(l), the trial court was required to make an affirmative finding, supported by competent evidence, that Defendant was a danger to the community. *Pell*, 211 N.C. App. at 380-81, 712 S.E.2d at 192. "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013) (citation omitted). The trial court's findings do not show if it considered whether Defendant poses a risk of committing sex offenses after his release from incarceration, as is required by *Pell*, nor would the evidence presented by the State support such a finding.

On appeal, the State argues: (1) unlike *Pell*, there was no risk assessment or expert testimony showing that Defendant had a low risk of re-offending; (2) Defendant's past criminal history supports a finding that he is likely to re-offend; and (3) Defendant's mental health issues are likely to cause him to re-offend.

The State attempts to differentiate this case from *Pell* by stating that, in *Pell*, a risk assessment was performed and an expert witness testified that the defendant was unlikely to re-offend. However, the absence of a risk assessment or expert testimony fails to support that Defendant poses a risk of committing sex offenses upon release from incarceration.

The State next points to Defendant's criminal history to show that he was likely to commit sex offenses after release from incarceration. During the hearing, the prosecutor referenced Defendant's prior felony convictions and argued: "I would look at [] [D]efendant's history to see what is going to happen in [] [D]efendant's future. . . . He is clearly an habitual status and has been for some time and I am concerned about [] [D]efendant being out in the community." Defendant's attorney clarified that none of the previous convictions were for violent or sexual offenses and the majority were larceny offences. In *State v. Jones*, 234 N.C. App. 239, 758 S.E.2d 444, this Court addressed the trial court's determination that a defendant represented a risk of committing another sexual offense for the purposes of satellite-based monitoring. In *Jones,* the trial court similarly pointed to the defendant's prior commission of a nonsexual offense. This Court stated that "the [prior] offense was a nonsexual offense and does not indicate any increased risk that he would commit another sexual offense. Consequently, this finding does not support a conclusion that defendant is at a high risk of reoffending[.]" *Jones*, 234 N.C. App. at 245, 758 S.E.2d at 449. While *Jones* was addressing the trial court's determination in the SBM context, the same reasoning applies here and Defendant's non-violent, non-sexual convictions do not indicate an increased risk that he would commit another sexual offense.

Finally, the State argues that "Defendant's untreated mental health issues are evidence that he is a danger to the community." Based on the trial court's oral findings, the Defendant's mental health was not a basis for its determination that Defendant was a danger to the community. Even assuming, *arguendo*, that the trial court had relied on Defendant's mental health in reaching its determination, there was insufficient evidence about Defendant's mental health for it to serve as competent evidence that he was a danger to the community.

In *State v. Harding*, ___ N.C. App. ___, ___, 813 S.E.2d 254, 266-67 (2018), this Court acknowledged that a defendant's need for "psychiatric and/or psychological counseling" "*may* implicate 'sexually violent predator' classification" under N.C. Gen. Stat. § 14-208.6(6) (2013). A "[s]exually violent predator" is "a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder *that makes the person likely to engage in sexually violent offenses*[.]" N.C.G.S. § 14-208.6(6) (emphasis added). While the trial court in *Harding* ordered "psychiatric and/or psychological counseling," this Court held that it had failed to adequately explain its rationale in ordering lifetime sex offender registration and satellite-based monitoring. *Harding*, ___ N.C. App. at ___, 813 S.E.2d at 266-67.

Similarly, in the present case, Defendant's mental health issues *may* show that he is a danger to the community *if* the State is able to show that those issues led Defendant to have an increased risk of engaging in sex offenses after incarceration.

However, the State offered no evidence showing that there was a connection between Defendant's diagnosed mental conditions and the commission of sex offenses or recidivism generally. Relatedly, although Defendant's failure to take his prescribed medications on the date in question *may* have led Defendant to commit these offenses, the State failed to present evidence establishing that link or that Defendant habitually failed to take his medications.

Finally, the trial court's reliance on Defendant's current convictions to support a finding that Defendant was a danger to the community was improper. Under N.C. Gen. Stat. § 14-208.6(4)(a) (2017), our General Assembly outlined a variety of offenses that would, upon conviction, constitute "reportable offenses" requiring registration. A conviction under N.C.G.S. § 14-202(d), (e), (f), (g), or (h), is not a conviction that automatically constitutes a "reportable offense," but rather an additional showing is required that a defendant is a danger to the community. N.C.G.S. § 14-208.6(4)(d); N.C.G.S. § 14-202(l). If the General Assembly had intended that a conviction for peeping — in and of itself — would show that a defendant was a danger to the community, it would have included such offense in N.C.G.S. § 14-208.6(4)(a).

III. Conclusion

The trial court was required pursuant to N.C.G.S. § 14-202(l) to make a finding as to whether Defendant was a danger to the community, in that he posed a risk of committing sex offenses upon release from incarceration. It is not clear from the

record that the trial court considered whether Defendant posed a risk of committing sex offenses after release from incarceration. Additionally, in order to support such a finding, there must be a connection between the evidence presented and the likelihood that a specific defendant will commit a sex offense. As in *Pell*, the record evidence does not support the trial court's conclusion that Defendant represented a "danger to the community" as there was no evidence showing the connection between the evidence proffered by the State and the risk of committing future sex offenses. Therefore, we reverse the trial court's order requiring Defendant to register as a sex offender and remand for resentencing.

REVERSED AND REMANDED.

Judges CALABRIA and DIETZ concur.

Report per Rule 30(e).