IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-262

No. COA20-509

Filed 1 June 2021

Wilson County, No. 18 CRS 51704

STATE OF NORTH CAROLINA

v.

JOSHUA BLAKE TAYLOR

Appeal by defendant from judgment entered 19 February 2020 by Judge J. Carlton Cole in Wilson County Superior Court. Heard in the Court of Appeals 27 April 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

TYSON, Judge.

¶ 1 Joshua Blake Taylor ("Defendant") filed a petition for writ of certiorari seeking this Court to hear his otherwise barred appeal from the trial court's judgment ordering him to enroll in lifetime SBM. We allow his petition in part and dismiss his action without prejudice.

I. Background

¶ 2 Defendant, his wife, and two young children, one male, one female, moved to Rocky Mount in 2016 after Defendant was honorably discharged from service in the United States Army. Defendant uploaded child pornographic images and videos onto the internet on multiple occasions from December 2017 through 9 May 2018. Google LLC reported these actions to the State Bureau of Investigation ("SBI").

¶ 3 The SBI reviewed the images and identified Defendant having anal intercourse with his two to three-year-old son from an uploaded video, using Defendant's own name, email, and phone number. In the video, Defendant's face is visible, and he was also identifiable by a tattoo. Three different videos showed Defendant sodomizing his infant son, though he admitted to only one of the sexual acts.

¶ 4 Three hundred and ten files containing videos and still photographs depicting sexual acts were obtained from Defendant's electronic devices. Eight videos involved toddlers; 299 still images were found, 98 of which involved toddlers. Eight still images depicted Defendant's five-year-old daughter, nude from the waist down, with an adult male spreading her buttocks apart while rubbing his penis against her buttocks. The adult male perpetrator in the images was not identifiable from the photos of his genitals.

¶ 5 Defendant was charged and indicted on four counts of first-degree sexual exploitation of a minor, four counts of first-degree statutory sex offense, and two counts of taking indecent liberties with a child. Defendant pled guilty to one count of first-degree sexual exploitation of a minor and one count of first-degree statutory sex offense on 10 February 2020. The additional sexual offenses against children were dismissed by the State pursuant to Defendant's plea agreement.

II. Procedural History

¶ 6 During the proceedings in open court on 10 February 2020, a colloquy occurred as follows:

> [PROSECUTOR]: Judge, State's proceeding again in 18-CRS-51704, first degree sexual exploitation of a minor and first degree statutory sex offense.
>
> THE COURT: [H]ow does [Defendant] plead to those charges?
>
> [DEFENSE COUNSEL]: Pleads guilty, Judge.

¶ 7 The prosecutor submitted a Static-99R report, an actuarial assessment instrument for use with adult male sexual offenders, which ranked Defendant with a moderate-low risk of re-offending during sentencing. At the initial hearing, the prosecutor mistakenly contended that satellite-based monitoring ("SBM") "would not be triggered in this case and [Defendant] would be subject to 30-year sex offense registration."

¶ 8 The next day, with Defendant again present in open court, the trial court summarized the prior day's events, stating Defendant had "entered a plea of guilty to a B1 offense and a C offense and was sentenced by the [c]ourt, that the [c]ourt viewed the Static 99 and the AOC-615" and determined SBM was not required."

¶ 9 The court recognized Defendant's counsel during his plea and sentencing was not available, and it assigned other counsel ("Sentencing Counsel") to aid and advise Defendant as a "friend of the court." The court informed Defendant that "[a]fter . . . research by the District Attorney's Office, it was determined [the statute] required (sic) to make that finding that [Defendant] participate in [SBM]." Defendant indicated he had an opportunity to talk to Sentencing Counsel, was satisfied with his representation, and he understood the consequences of his plea.

¶ 10 The prosecutor explained that during the prior day at sentencing, he did not have in his possession the AOC-CR-615 form SBM order. He explained as he later began to fill out the form, he realized he had "neglected to cover . . . sexual offense with a child, G.S. 14-27.28." The prosecutor noted the Static-99R form, which resulted in Defendant being assessed a moderate-low risk of re-offending was based only upon Defendant's age and the victim being a male. The prosecutor noted the findings on the AOC-CR-615 form that Defendant had been convicted of a reportable conviction under "offenses listed" referring to N.C. Gen. Stat. § 14-208.6. Specifically, Defendant pled to committing a sexually violent offense and sexual offense with a child, stating, "that is what [Defendant] pled to." The prosecutor pointed to the AOC-CR-615 form and identified where conviction of those two admitted criminal acts "require lifetime GPS monitoring" pursuant to the applicable statutes and on the

AOC form.

¶ 11 Defendant's Sentencing Counsel stated:

> I showed [Defendant] the form, explained it to him as the D.A. explained it to me, Judge, and I believe we understand that there's not really any discretion in this matter, that what he pled to is what he's pled to and that he, therefore, qualifies under lifetime GPS monitoring or satellite-based monitoring.

¶ 12 The trial judge then addressed and inquired directly of Defendant if he understood what the court would be ordering regarding the imposition of SBM, if Defendant was satisfied with Sentencing Counsel's representation, and if Defendant had any questions about anything that had been discussed. In open court, Defendant responded he was pleased with his representation, understood the reason and outcome of the hearing, and had no further questions. Sentencing Counsel entered an oral notice of appeal on Defendant's behalf.

III. Jurisdiction

¶ 13 A defendant who enters a guilty plea, without preserved rulings, has no statutory right to appeal from the trial court's judgment. *See* N.C. Gen. Stat. § 15A-1444(e) (2019). Defendant did not file a written notice of appeal to invoke this Court's jurisdiction, as is required to bring an appeal for imposition of SBM pursuant to N.C. R. App. P. 3.

¶ 14 Defendant, recognizing his appeal is otherwise barred, filed a petition for writ of certiorari to invoke jurisdiction in this Court to request review of a civil order. "*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). A writ of certiorari is permitted and issued only when the appeal is shown to be meritorious, a defendant demonstrates prejudice, and "the ends of justice will be thereby promoted." *King v. Taylor*, 188 N.C. 450, 451, 124 S.E. 751 (1924).

¶ 15 This Court's discretion to allow Defendant's petition and to issue the writ, requires Defendant's "petition for the writ [of certiorari] must show merit or that error was probably committed below." *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9 (citation omitted). We allow the petition and issue the writ of certiorari in part for the limited purpose to preliminarily review whether Defendant has waived or invited any error or asserts merit or prejudice.

IV. Issues

¶ 16 Defendant argues the trial court erred in determining he is required to enroll in mandatory lifetime SBM, because his conviction under § 14-27.29 did not require it. Defendant also argues the trial court erred in ordering him to enroll in lifetime SBM without finding the SBM search was reasonable. Alternatively, Defendant argues Sentencing Counsel provided ineffective assistance of counsel ("IAC") by conceding Defendant was subject to lifetime SBM.

V. SBM Determination

A. Standard of Review

> [W]e review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we 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. We [then] 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. Blankenship, 270 N.C. App. 731, 734, 842 S.E.2d 177, 180 (2020) (citations omitted).

B. Analysis

¶ 17 Defendant argues he was convicted under N.C. Gen. Stat. § 14-27.29 of "first-degree statutory sexual offense," and such conviction does not qualify him for lifetime SBM. Defendant correctly asserts mandatory lifetime monitoring is statutorily required when a defendant is convicted under N.C. Gen. Stat. § 14-27.28 of "statutory sexual offense with a child by an adult." N.C. Gen. Stat. § 14-27.28 (2019).

¶ 18 "It is not fatal if an indictment is not perfect with regard to form or grammar if the meaning of the indictment is clearly apparent so that a person of common understanding may know what is intended." *State v. Hill*, 262 N.C. App. 113, 115, 821 S.E.2d 631, 633 (2018) (citations and internal quotation marks omitted).

¶ 19 The indictment in 18-CRS-51704 the prosecutor referred to clearly provides: "14-27.28" and "I. FIRST DEG SEX EXPLOIT MINOR II. FIRST DEGREE

STATUTORY SEX OFFENSE OF PERSON 13 YEARS OR YOUNGER." As previously noted, a colloquy at trial occurred as follows:

> [PROSECUTOR]: Judge, State's proceeding again in 18-CRS-51704, first degree sexual exploitation of a minor and first degree statutory sex offense.
>
> THE COURT: [H]ow does [Defendant] plead to those charges?
>
> [DEFENSE COUNSEL]: Pleads guilty, Judge.

¶ 20 The judgment is consistent with the indictment, and concludes Defendant pled guilty to "FIRST DEG SEX EXPLOIT MINOR." The second judgment states, "FIRST DEGREE STATUTORY SEX OFFENSE" and under the applicable statutory "G.S. No.," it reads "14.27.28." It is clear as the prosecutor admitted, he had mistakenly spoken the previous day.

¶ 21 The clerical error is harmless. Defendant's violation of N.C. Gen. Stat. § 14-27.28 is consistently referred to throughout the record. The title here is clearly a clerical error, as it should be read consistent with the warrants and indictment forms and read "FIRST DEGREE STATUTORY SEX OFFENSE OF PERSON 13 YEARS OR YOUNGER." Defendant's argument wholly negates the second count and the language referring sexual acts with a child under the age of 13.

¶ 22 Defendant's prior notice of the charges and intent of his plea are clear. The State sought to enforce Defendant's guilty plea to N.C. Gen. Stat. § 14-27.28.

¶ 23 The colloquy continues:

> [THE COURT]: Have the charges been explained to you by your lawyer and do you understand the nature of the charges and do you understand every element of each charge?
>
> [DEFENDANT]: Yes, sir.
>
> [THE COURT]: Have you and your lawyer discussed possible defenses, if any, to the charges?
>
> [DEFENDANT]: We have.

¶ 24 Further, SBM was imposed upon Defendant on the statutory basis that he had committed a statutory sex offense with a victim under the age of 13, he had also committed a sexually violent offense; and he is not currently on unsupervised release, as he was serving the active sentence received the previous day. *State v. Grady,* 372 N.C. 509, 547, 831 S.E.2d 542, 570 (2019).

¶ 25 Defendant knew he had been charged, indicted, and he had pled guilty to sodomizing his two to three-year-old son, while Defendant was in his mid-twenties. The only difference between the language of the two statutes Defendant challenges are the age requirements. Defendant exceeds both. *See* N.C. Gen. Stat. §§ 14-27.28, 14-27.29 (2019).

¶ 26 Defendant was not merely older than twelve years, he was also older than eighteen years. His son was twenty plus years younger and was under the age of thirteen. To assert Defendant was unclear about another statute that required him to be older than twelve, but at least four years older than the victim, defies logic and reason, especially given that he is the biological father of the victim. *See Hill*, 262 N.C. App. at 115, 821 S.E.2d at 633.

¶ 27 The indictment form contains the correct statute and correct title. The indictment also contains language from N.C. Gen. Stat. § 14-27.29, which is wholly illogical as applied to the facts in this case. N.C. Gen. Stat. § 14-27.29 provides a lesser-included offense scenario, in which a child under the age of 13 is sexually assaulted by another person who is more than four years older. *See generally* N.C. Gen. Stat. §§ 14-27.28 and 14-27.29. N.C. Gen. Stat. § 14-27.29 is wholly inapplicable to the facts before us.

¶ 28 Next, Defendant argues the indictment indicates he pled guilty to the wrong crime. Given the clear notice to Defendant about the crime in question, and his failure to challenge the validity of the indictment in the trial court, in light of his guilty plea, his first attempt to challenge the indictment in his PWC fails. *See State v. McGee*, 175 N.C. App. 586, 588, 623 S.E.2d 782, 784 (2006) ("By pleading guilty, defendant thus waived his right to challenge the indictment on the ground that the information in the indictment was incorrect.").

¶ 29 Further, at the beginning of both the trial and sentencing, two clerical errors were corrected before Defendant's plea was entered. No objection was made, and no concern raised by Defendant to challenge the statutory language in the indictment or the offenses at issue at that time prior to entry of his plea.

¶ 30 Finally, the AOC-CR-615 form provides, "Use this form to make additional findings and orders concerning sex offender registration and satellite-based monitoring for a defendant who is convicted of a reportable conviction as defined by G.S. 14-208.6(4)." Under the findings, the trial court marked both "(1b) a sexually violent offense, and (1d), sexual offense with a child. G.S. 14-27.28." The imposition of SBM is statutorily required and was rightfully applied to Defendant based upon his plea to "sexual offense with a child. G.S. 14-27.28."

¶ 31 Defendant's argument that he was not statutorily qualified for SBM for failure to be convicted of violating N.C. Gen. Stat. § 14-27.28 is without merit.

VI. Reasonableness of Lifetime SBM

¶ 32 Defendant argues the State failed to show his lifetime enrollment in SBM constituted a reasonable search under the Fourth Amendment as required by *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542. (2019). If properly challenged, preserved, and not waived, "the State shall bear the burden of proving that the SBM program is reasonable." *State v. Blue*, 246 N.C. App. 259, 265, 783 S.E.2d 524, 527 (2016) (citations omitted).

¶ 33 The transcript of Defendant's SBM hearing contains an exchange in open court directly between the trial judge and Defendant with the State and Sentencing Counsel present:

THE COURT: [T]he Defendant through his attorney entered a plea of guilty to a B1 offense and a C offense and was sentenced by the Court, that the Court viewed the Static 99 and the AOC-615, that the judgment was entered not requiring [Defendant] to participate in the satellite-based monitoring program. Counsel, is that -- those findings correct up to that point?

[PROSECUTOR]: Yes, sir.

THE COURT: [Sentencing Counsel], you would agree up to that point?

[SENTENCING COUNSEL]: Yes, sir, Judge.

. . . .

THE COURT: [Sentencing Counsel] was assigned as a friend of the Court to talk to [Defendant] about this. [Defendant], have you had an opportunity to speak to [Sentencing Counsel] about the AOC-615?

DEFENDANT: Yes, sir.

THE COURT: You understand that yesterday we entered an order that did not require you to participate in the satellite-based monitoring program.

DEFENDANT: Yes.

THE COURT: After a research by the District Attorney's Office, it was determined that you -- that we were required to make that finding that you participate in that.

DEFENDANT: I understand.

THE COURT: I have ordered that [Sentencing Counsel] be assigned to represent you. Have you had an opportunity to speak with him –

DEFENDANT: Yes, sir.

THE COURT: -- about this issue?

DEFENDANT: I have.

THE COURT: Are you satisfied with his representation –

DEFENDANT: Yes, sir.

THE COURT: -- on this issue?

DEFENDANT: Yes, sir.

THE COURT: And you're prepared to move forward with his assistance?

DEFENDANT: Yes, sir.

[PROSECUTOR]: Thank you, Your Honor. And, Judge, this was my fault. I did not have the form in front of me yesterday and I should have. I believe I started on AOC-615, I believe I started to write number 2 under the findings. Those things are still correct, that the Defendant has not been classified as a sexually violent predator, the Defendant is not a recidivist and the offenses were not an aggravated offense. However, what I neglected to cover was number 1 where the finding b, it's a sexually violent offense listed under the registered offenses and, more importantly, 1d where it expressly states that sexual offense with a child, G.S. 14-27.28, that was not checked or found in the dispositive and not contended by the State, however, that is what he pled to, so that would not affect his time on registration under the order part of the form, Judge, it would still be registration for 30 years. What it would affect, however, is number 2 under the order, under the sentencing hearing where it says if any -- if number 1d or any of those other ones are found affirmative it would be

-- Defendant shall enroll in satellite-based monitoring for his or her natural life unless terminated pursuant to 14-208.43. So that is the error that we want to correct today, Judge, that it was found or we would ask that it be found that number 1d in the dispositive he did -- he was convicted of sexual offense with a child under G.S. 14-27.28 and that would then require lifetime GPS monitoring.

THE COURT: Okay. Thank you, sir.

. . . .

[SENTENCING COUNSEL]: Thank you, Judge. I spoke with [Defendant] about that. I showed him the form, explained it to him as the D.A. explained it to me, Judge, and I believe we understand that there's not really any discretion in this matter, that what he pled to is what he's pled to and that he, therefore, qualifies under lifetime GPS monitoring or satellite-based monitoring.

THE COURT: [Defendant], do you have any questions about what we're doing today?

DEFENDANT: No, sir.

THE COURT: Are you satisfied with the representation of [Sentencing Counsel]?

DEFENDANT: Yes, sir.

THE COURT: [T]he Court would make those findings, that 1b and order that he participate in the satellite-based monitoring program. And the Court on its own motion is going to order that [Sentencing Counsel] be compensated at the rate for two hours and that's to be added to the cost for [Defendant]. Do you have any questions about that, [Defendant]?

THE DEFENDANT: No, sir.

> THE COURT: Do you have any other questions related to this matter?
>
> DEFENDANT: No.

¶ 34 Defendant failed to raise any objections or constitutional challenge at any time during the hearing. Sentencing Counsel did not file a motion, object, or assert an argument against the SBM or argue the SBM was inapplicable to Defendant, or that the SBM being imposed was an unreasonable search.

¶ 35 The facts before this Court are similar to those in *Blankenship* and *State v. Bishop*, wherein each defendant was convicted of child sex crimes and sentenced with imposition of SBM. *See Blankenship*, 270 N.C. App. at 732-33, 842 S.E.2d at 179; *State v. Bishop,* 255 N.C. App. 767, 768, 805 S.E.2d 367, 369 (2017).

¶ 36 In both *Blankenship* and *Bishop*, defense counsel had failed to raise objections or constitutional challenges in response to the State's argument or showing. *See Blankenship*, 270 N.C. App. at 739, 842 S.E.2d at 183; *Bishop*, 255 N.C. App. at 768, 805 S.E.2d at 369. This Court held: "The defendant did not raise any constitutional issue before the trial court, cannot raise it for the first time on appeal, and has waived this argument on appeal." *Blankenship*, 270 N.C. App. at 731, 842 S.E.2d at 183 (citations omitted).

¶ 37 In *Bishop*, the defendant requested for this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to review his constitutional challenge. This

Court explained, "Bishop's argument for invoking Rule 2 relies entirely on citation to previous cases . . . where the Court invoked Rule 2 because of circumstances unique to those cases." *Bishop*, 255 N.C. App. at 769-70, 805 S.E.2d at 369.

¶ 38 This Court differentiated other child sex offense cases wherein Rule 2 had been invoked from those in *Bishop* because at the time *Bishop* was decided "the law governing preservation of this issue was settled at the time Bishop appeared before the trial court." *Id*.

> [W]e must be cautious in our use of Rule 2 not only because it is an extraordinary remedy intended solely to prevent manifest injustice, but also because 'inconsistent application' of Rule 2 itself leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not.

Id. at 770, 805 S.E.2d at 370 (citation omitted).

¶ 39 Defendant argues "manifest injustice" will result from lifetime SBM because he was twenty-seven years old when the order was imposed, his attorney at the re-hearing on SBM was a "friend of the court," the offenses were committed over a short period of time, and he had no prior criminal history. In the exercise of our discretion, these arguments are insufficient to invoke Rule 2, when other procedures are available to Defendant.

¶ 40 The record and transcript before this Court is replete with Defendant's acknowledgment of his actions. During sentencing, the prosecution noted the Static-

99R form, which reflects Defendant having a moderate-low risk of recidivism, was based upon Defendant's young age and the victim being a male. The form omitted and did not reflect the true facts of the crimes to which the Defendant pled.

¶ 41 Defendant pled guilty to two charges, first, that he committed a sexually violent offense when he engaged in anal intercourse with his two to three-year-old son, and secondly, that it was a sexual offense with a toddler-aged child. The prosecutor emphasized "that is what [Defendant] pled to." The prosecutor then pointed to the AOC-CR-615 form and explained the admitted findings "require lifetime GPS monitoring" pursuant to the AOC form and statutes.

¶ 42 Defendant mischaracterizes and mistakes the weight of his plea by claiming his lifetime SBM is "based only upon the erroneous finding that he committed a sex offense with a child." "The judge may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea." N.C. Gen. Stat. § 15A-1022(c) (2019).

¶ 43 This Court explicitly disagreed with a defendant who argued that the trial court's finding related to factual basis for his *North Carolina v. Alford* plea could not be used in determining whether he should have enrolled in SBM. *See generally, North Carolina v. Alford,* 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970) (holding a defendant intelligently concludes that his interests require entry of a guilty plea when the record contains strong evidence of actual guilt); *see also State v. Green*, 211 N.C. App.

599, 602, 710 S.E.2d 292, 294-95 (2011). Defendant demonstrates no merit or prejudicial error in a finding to which there is undisputed video evidence and a knowing guilty plea by Defendant in exchange for the State's dismissal of multiple other sexual charges.

¶ 44 The State's presented evidence, which tended to show 310 files of videos and still photographs depicting sexual acts with minors were recovered from Defendant's electronic devices. Eight videos depicted toddlers. Two hundred ninety-nine were still images, of which 98 photos depicted toddlers. Eight were still images of Defendant's five-year-old daughter nude from the waist down being sexually assaulted.

¶ 45 The prosecution presented the factual basis to support the findings Defendant had pled guilty to support a conclusion he: (1) engaged in sexually violent offense, and (2) the sexual offense was against a child. These findings are uncontroverted, undisputed, and were admitted to by the Defendant in open court.

¶ 46 The prosecutor initially noted the Static-99R omitted and incorrectly asserted only that Defendant was between the ages of 18 and 34.9 and that the victim was a male, making him of average risk to commit future sexual crimes. The following day these errors were brought before the court and Defendant was present. He was appointed and represented by counsel.

¶ 47 These findings of sexual violations of Defendant's children, balanced with the statute, Defendant's guilty plea, Defendant's multiple offenses, the Static-99R, and the findings on the AOC form, led to the court's determination that imposition of lifetime SBM was both required and reasonable.

¶ 48 Defendant's arguments asserting he is a one-time offender, in the prime of his life, and the "short duration" of his offenses to mitigate his culpability and actions are not persuasive. The weight of the "competent record evidence, and . . . trial court's conclusions of law for legal accuracy and . . . application of law to the facts found . . . requires the highest possible level of supervision and monitoring." *Blankenship*, 270 N.C. App. at 734, 842 S.E.2d at 180.

¶ 49 "In the absence of any argument specific to the facts of *this* case, [defendant] is no different from countless other defendants whose constitutional arguments were barred on direct appeal because they were not preserved for appellate review." *Bishop* 255 N.C. App. at 769–70, 805 S.E.2d at 369 (emphasis original); *see also Grundler*, 251 N.C. at 177, 111 S.E.2d at 1 (death sentence appeal).

VII. Ineffective Assistance of Counsel

¶ 50 Defendant asserts he received IAC. This Court reviews this issue *de novo*. *State v. Foreman*, 270 N.C. App. 784, 788, 842 S.E.2d 184,187 (2020).

¶ 51 Defendant asserts the order from his 2020 SBM hearing violates our Supreme Court's holding in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) (*Grady III*), and the trial court's imposition of SBM without challenge, deprived him of his right to effective counsel. *See* N.C. Gen. Stat. § 7A-451(a)(18) (2019) (stating indigent defendants are entitled to counsel during SBM proceedings).

¶ 52 The legislature, by establishing a right to counsel in SBM proceedings, recognized adequate representation is necessary to protect the important interests of a defendant during an SBM hearing. The right to counsel provided by § 7A-451(a)(18) must be coupled with a remedy for allegedly deficient representation. *See King v. Baldwin*, 276 N.C. 316, 325, 172 S.E.2d 12, 18 (1970) ("It is presumed that the legislature acted in accordance with reason and common sense and that it did not intend an unjust or absurd result").

¶ 53 The State argues IAC claims are not available in "civil" SBM proceedings, "[a]n order for enrollment in SBM is a civil penalty." *Blankenship*, 270 N.C. App. at 740, 842 S.E.2d at 183. N.C. Gen. Stat. § 7A-451(a)(18) is a statutory entitlement to counsel in an SBM hearing and alters the State's assertion. The State is free to assert the imposition of SBM as an express condition of offering a plea bargain and dismissal of other charges. *See* N.C. Gen. Stat. § 15A-1021 (2019).

¶ 54 IAC claims are analyzed using the two-pronged standard articulated in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984), which requires a showing that defense counsel's performance was objectively unreasonable and that there is a reasonable probability that counsel's deficient performance affected the outcome. In certain types of cases, however, prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost" of litigation and thus "prejudice is presumed." *Id.* at 692, 80 L. Ed. 2d at 696.

¶ 55 Here, Sentencing Counsel did not object or request further findings or conclusions to determine whether SBM was a reasonable search under the Fourth Amendment. Sentencing Counsel made one statement in response, "I spoke with [Defendant] about that [SBM]. I showed him the form, explained it to him . . . we understand that there's not really any discretion in this matter, that what he pled to is what he's pled to and [that conviction] qualifies under lifetime [SBM]."

¶ 56 Sentencing Counsel was appointed after sentencing the previous day and prior to the imposition of SBM. Sentencing Counsel merely explained the details surrounding the SBM with Defendant.

¶ 57 The record does not disclose the conditions of Defendant's plea, Defendant's conversations with his trial counsel or with Sentencing Counsel. The record before this Court at this time is not sufficient to determine if defense counsel's performance was objectively unreasonable, or if there is a reasonable probability that counsel's deficient performance affected the outcome. *Strickland*, 466 U.S. at 684, 80 L. Ed. 2d at 691. Defendant's IAC claim is dismissed without prejudice for Defendant to file a Motion for Appropriate Relief.

VIII. Conclusion

¶ 58 The trial court's conclusion and judgment to impose SBM on Defendant is supported by the nature of the charges, the factual basis for his guilty pleas, the State's decision to dismiss existing indictments and to forego further charges, the Static-99R risks, and the additional findings of fact. The trial court properly found SBM was statutorily and lawfully required to be imposed upon Defendant for his conviction.

¶ 59 Defendant failed to assert during trial and waived direct appellate review of any constitutional or Fourth Amendment reasonableness challenges to the SBM order. His argument is dismissed.

¶ 60 Defendant was entitled to effective counsel during the SBM hearing for the imposition of the lifetime SBM. Defendant's IAC claim is dismissed without prejudice.

¶ 61 The judgments and sentences entered upon Defendant's guilty plea and assertion of unpreserved constitutional error are affirmed. *It is so ordered.*

AFFIRMED IN PART, DISMISSED IN PART.

Chief Judge STROUD and Judge ZACHARY concur.

Report per Rule 30(e).