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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-879

No. COA20-811

Filed 20 December 2022

Nash County, No. 12CRS55226

STATE OF NORTH CAROLINA

v.

KEVIN MATTHEW DAVIS, Defendant.

Appeal by defendant from order entered 28 January 2020 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 21 September 2021.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele Goldman, for defendant-appellant.

GORE, Judge.

¶ 1

Defendant, Kevin Matthew Davis, appeals from the trial court's order requiring him to enroll in satellite-based monitoring ("SBM") for a term of 10 years. This Court has jurisdiction to hear this appeal as a matter of right from a final judgment of the superior court. N.C. Gen. Stat. § 7A-27(b)(1) (2020); *State v. Singleton*, 201 N.C. App. 620, 626, 689 S.E.2d 562, 566, *disc. rev. improvidently*

allowed, 364 N.C. 418, 700 S.E.2d 226 (2010).

¶ 2 On appeal, defendant argues the trial court erred by ordering 10 years of SBM enrollment because: (1) the State presented no additional evidence of risk; and (2) he did not qualify for enrollment as second-degree sexual offense is not an offense involving the physical, mental, or sexual abuse of a minor. Additionally, defendant contends the trial court erred by imposing 10 years of SBM where the State failed to demonstrate the search met constitutional standards of reasonableness as applied to him. We affirm the trial court's order.

I.

¶ 3 On 15 October 2013, defendant appeared in Nash County Superior Court before the Honorable Quentin T. Sumner, judge presiding, and pled guilty pursuant to a plea agreement to one count of second-degree sexual offense. Under the terms of his plea, the State dismissed two charges of indecent liberties and two charges of statutory sex offense with a child. The trial court sentenced defendant in the presumptive range to an active term of 73 to 148 months imprisonment.

¶ 4 On 4 September 2019, defendant was released from incarceration.¹ On 11 January 2020, the Division of Adult Correction notified defendant that he was subject

¹ Pursuant to N.C. Gen. Stat. § 8C-1, Rule 201, “we take judicial notice of this fact from the Department of Public Safety website’s offender search results.” *State v. Harwood*, 243 N.C. App. 425, 427 n.2, 777 S.E.2d 116, 118 (2015) (citations omitted).

to a SBM determination hearing based on his 15 October 2013 conviction involving the physical, mental, or sexual abuse of a minor. On 28 January 2020, Judge Sumner conducted an SBM “bring-back” hearing to consider the State’s application for SBM enrollment. Defendant was present and represented by counsel.

¶ 5

The entirety of the SBM hearing is as follows:

[THE STATE]: We do have a Static-99. Your Honor, if I may approach?

THE COURT: Yes, ma’am.

[THE STATE]: Have you seen this?

[DEFENSE COUNSEL]: Yes.

(Document handed up to the Court.)

[THE STATE]: Your Honor, this is State’s Exhibit 1, the Static-99. The State moves to admit.

THE COURT: The State’s 1 is admitted. Anything further?

[THE STATE]: No, sir, You Honor.

[THE COURT]: Yes, sir, [defense counsel]?

[DEFENSE COUNSEL]: Judge, it’s my understanding [defendant] does not fall into one of the mandatory categories. And the Static-99 shows a 1. It’s not a high score. I don’t believe he’s a risk, so I would ask the State not to order [SBM].

(The Court reviewing.)

THE COURT: All right, Madam Clerk, the Defendant will be required to submit to [SBM] for a period of ten years.

Thank you, gentlemen.

[DEFENSE COUNSEL]: So, Judge, just to clarify, he will be required to register for ten years' [SBM]?

THE COURT: Yes, sir, as well as to register as being a sex offender.

[THE STATE]: Thank you, Judge.

THE COURT: Thank you.

¶ 6 After the State presented its case and the defense counsel did not object, the trial court entered its written order concluding that defendant requires the highest possible level of supervision and monitoring for a period of 10 years. Defendant filed written notice of appeal from the trial court's SBM order.

II.

¶ 8 In *State v. Kilby*, this Court outlined “[t]he procedure for SBM hearings [a]s set forth in N.C. Gen. Stat. §§ 14-208.40A and 14-208.40B.” 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (citation omitted). In this case, as in *Kilby*, defendant's hearing was held pursuant to N.C. Gen. Stat. § 14-208.40B, which “applies in cases in which the offender has been convicted of an applicable conviction and the trial court has not previously determined whether the offender must be required to enroll in SBM.” *Id.* at 367, 679 S.E.2d at 432-33 (citation omitted). “The hearing procedure set forth in N.C. Gen. Stat. § 14-208.40B has two phases; . . . the qualification phase and the risk assessment phase.” *Id.* at 367, 679 S.E.2d at 433

(internal citation omitted).

¶ 9 “On appeal from an SBM order, we 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.” *State v. Green*, 211 N.C. App. 599, 601, 710 S.E.2d 292, 294 (2011) (quotation marks and citation omitted).

A.

¶ 10 First, defendant argues the trial court erred by finding his crime and conviction involved the sexual abuse of a minor. Specifically, defendant contends the trial court impermissibly based this finding upon the factual basis for his plea when the trial court was required to use an elements-based test in making its determination. We lack jurisdiction to address this argument.

¶ 11 “Our Court has interpreted SBM hearings and proceedings as civil, as opposed to criminal, actions, for purposes of appeal. Therefore, a defendant must give notice of appeal pursuant to N.C. R. App. P. 3(a), from an SBM proceeding.” *State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 520 (2016) (citation and quotation marks omitted). Rule 3 requires, *inter alia*, a party to “file and serve a notice of appeal . . . within thirty days after entry of judgment . . .”, N.C. R. App. P. 3(c)(1), and “designate the judgment or order from which appeal is taken” N.C. R. App. P.

3(d). “A party must comply with the requirements of Rule 3 to confer jurisdiction on an appellate court.” *In re Moore*, 234 N.C. App. 37, 40, 758 S.E.2d 33, 36 (2014) (citation omitted).

¶ 12 Here, defendant gave notice of appeal from the SBM order entered 28 January 2020. In attacking his statutory qualification for SBM enrollment, defendant challenges findings of fact on a prior order for Sentencing Hearing, which incorporates findings from his underlying criminal judgment and commitment entered 15 October 2013. Defendant challenges findings on a judgment and underlying order entered almost six and a half years prior to the SBM order now designated on appeal. We express no opinion on the merits, if any, of defendant’s claim asserting he did not qualify for SBM enrollment based on his crime of conviction. We conclude this Court is without jurisdiction to review the issue of qualification as defendant neither designated nor took timely appeal from the underlying judgment and Sentencing Hearing order.

B.

¶ 13 Next, defendant argues the trial court erred by ordering SBM enrollment when the State presented no additional evidence, and the trial court made no additional findings, to support a conclusion that he required the highest possible level of supervision and monitoring. Defendant waives review of this argument after failing to raise a timely exception to the trial court’s SBM determination on grounds the

State presented insufficient evidence of risk. N.C.R. App. P. 10(a)(1).

¶ 14 “[W]here an offender is determined to pose only a low or moderate risk of reoffending, the State must present additional evidence to support a determination that the offender requires the highest possible level of supervision and monitoring.” *State v. Thomas*, 225 N.C. App. 631, 633, 741 S.E.2d 384, 386 (2013) (citation omitted). In both *Kilby* and *State v. Causby*, 200 N.C. App. 113, 683 S.E.2d 262 (2009), this Court reversed SBM orders where the defendant was assessed “as a ‘moderate’ risk and the State presented no evidence to support findings of a higher level of risk or to support the requirement for ‘the highest possible level of supervision and monitoring[.]’” *Kilby*, 198 N.C. App. at 370-71, 679 S.E.2d at 434; *Causby*, 200 N.C. App. at 117, 683 S.E.2d at 265.

¶ 15 “[I]n order for an appellant to assert a constitutional *or statutory right on appeal*, the right must have been asserted and the issue raised before the trial court. In addition, it must affirmatively appear on the record that the issue was passed upon by the trial court.” *State v. Moses*, 205 N.C. App. 629, 635, 698 S.E.2d 688, 693-94 (2010) (quotation marks omitted) (alteration in original) (emphasis added) (quoting *State v. McDowell*, 301 N.C. 279, 291, 271 S.E.2d 286, 294 (1980); N.C.R. App. P. 10(b)(1) (2008)). An initial determination that defendant qualifies for SBM enrollment does not: (i) relieve the State of its responsibility to establish risk; nor does it, (ii) dispense with the requirement that a trial court support its conclusion

that an offender's risk level requires the highest level of supervision and monitoring with adequate findings based on competent evidence presented at the time of hearing. *See* §§ 14-208.40A(e); 14-208.40B(c). However, the defense was on notice at the end of the hearing that the trial court was requiring SBM enrollment based on the risk assessment alone but failed to present this argument or objection for a contemporaneous ruling.

C.

¶ 16 Defendant acknowledges he failed to preserve his Fourth Amendment reasonableness argument by not objecting to the constitutionality of the SBM order at trial and raising the issue of the first time on appeal. He asks this Court to reach the merits of this issue by invoking Rule 2 of the North Carolina Rules of Appellate Procedure. However, because defendant has not demonstrated he is “different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he has not argued any specific facts that demonstrate manifest injustice if we decline to invoke Rule 2, we do not believe this case is an appropriate use of that extraordinary step.” *State v. Cozart*, 260 N.C. App. 96, 101, 817 S.E.2d 599, 603, *rev. denied*, 371 N.C. 479, 818 S.E.2d 296 (2018) (citation omitted). We decline to invoke Rule 2 in this case.

III.

¶ 17 For the foregoing reasons, defendant failed to preserve his issues for appellate

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Opinion of the Court

review. Accordingly, we affirm the trial court's SBM order.

AFFIRMED.

Judge TYSON concurs.

Judge JACKSON concurs in result only.

Report per Rule 30(e).