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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-117

Filed 3 October 2023

Lenoir County, No. 20 CRS 51725

STATE OF NORTH CAROLINA

v.

RODNEY BENNETT MABLE, JR., Defendant.

Appeal by Defendant from judgment entered 31 May 2022 by Judge Imelda J. Pate in Lenoir County Superior Court. Heard in the Court of Appeals 6 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant-Appellant.

CARPENTER, Judge.

Rodney B. Mable, Jr. ("Defendant") appeals from judgment after the trial court imposed satellite-based monitoring ("SBM") for a period of ten years. On appeal, Defendant argues the trial court failed to make adequate findings of fact in its SBM order. After careful review, we agree with Defendant. Thus, we vacate the trial court's order without remand.

I. Factual & Procedural Background

On 31 March 2021, a Lenoir County grand jury indicted Defendant for, among other charges, indecent liberties with a child. On 31 May 2022, Defendant entered an *Alford* plea to the indecent-liberties charge in exchange for the State's dismissal of other charges.[1] The trial court accepted Defendant's plea and imposed a sentence of fourteen to twenty-six months of imprisonment.

Also on 31 May 2022, after accepting the plea and imposing an active sentence, the trial court considered imposing sex-offender registration and SBM. The State asked the trial court to enter the following factual findings: (1) Defendant's conviction was a sexually-violent offense but not an aggravated offense; (2) Defendant was not a recidivist, a reoffender, or a sexually violent predator; (3) Defendant's offense involved the physical, mental, or sexual abuse of a minor; (4) Defendant presents a danger to minors; and (5) Defendant's victim was twelve years old at the time of the offense. Defendant scored a "4" on the Static-99R form,[2] indicating Defendant posed an "Above Average Risk" of sexual recidivism. Along with the Static-99R form, the State introduced three studies, one from Tennessee and two from California, on the use of SBM and its effects on sexual recidivism.

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[1] In an *Alford* plea, the defendant pleads guilty to the pending charges while maintaining their innocence from the charges. *See North Carolina v. Alford*, 400 U.S. 25, 31–32, 91 S. Ct. 160, 164–65, 27 L. Ed. 2d 162, 164–65 (1970).

[2] This form is used to predict the sexual recidivism of the offender.

Based on the Static-99R report and the three studies, the trial court made the following findings of fact: (1) Defendant entered an *Alford* plea to a sexually violent offense; (2) Defendant was not a recidivist; (3) Defendant was not a reoffender; (4) Defendant was not a sexually violent predator; (5) the offense was not an aggravated offense; (6) the offense involved the physical, mental, or sexual abuse of a minor; (7) Defendant presents, or may present, a danger to minors; and (8) the victim was twelve years old at the time Defendant committed the offense. Findings of fact seven and eight do not relate to sex-offender registration or SBM.

Along with sex-offender registration, the trial court imposed SBM for a period of ten years. In its ruling, the trial court stated:

> [A] Static-99 was completed today. The Court has reviewed that document and arguments of counsel for both the State and the defendant. And orders in regard to satellite-based monitoring . . . that the defendant be monitored for a period of 10 years, pursuant to satellite-based monitoring. And the Court, again, will attach the Static 99 that was completed today, finding that the defendant's total score was a four. Which places him in the above average risk.

Defendant objected to the SBM order, asserting that absent a score equating to the "highest level of supervision" on the Static-99R report, the trial court was required to consider evidence beyond Defendant's score of "Above Average Risk." After noting Defendant's objection, the trial court upheld its order imposing SBM for a period of ten years. Defendant filed written notice of appeal on 31 May 2022.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b) (2021). *See State v. Singleton*, 201 N.C. App. 620, 626, 689 S.E.2d 562, 566 (2010).

III. Issues

The issues on appeal are whether the trial court erred in failing to: (1) consider any factual bases apart from the Static-99R report and the three studies to support its imposition of SBM; and (2) conduct an inquiry as to the reasonableness of SBM under the Fourth Amendment.

IV. Analysis

Defendant's first argument asserts the trial court erred in failing to find adequate facts to support its SBM order. The State concedes that "the trial court made no additional findings to explain the reasoning behind her decision that Defendant required SBM enrollment, and that the trial court's failure to do so was error." Thus, the only remaining question concerning the Defendant's first argument is whether this matter should be remanded to the trial court so it can make additional findings of fact or vacated without remand. The State contends that we should remand. We disagree.

This Court reviews "the trial court's findings of fact in an SBM order to determine whether they are supported by competent evidence, and . . . review[s] 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. Cheers*, 285 N.C. App. 394, 402, 878 S.E.2d 149, 154 (2022) (citation and internal quotations omitted). This

Court has "made it abundantly clear that the State shall bear the burden of proving that the [SBM] program is reasonable." *State v. Greene*, 255 N.C. App. 780, 783, 806 S.E.2d 343, 345 (2017) (citations and internal quotations omitted).

The hearing procedure for SBM under section 14-208.40B requires the trial court to make findings of fact pursuant to section 14-208.40A. N.C. Gen. Stat. §§ 14-208.40B(c), .40A (2021). Section 14-208.40A provides, in relevant part:

> Upon receipt of a risk assessment . . . the court shall determine whether, based on the . . . risk assessment and all relevant evidence, the offender requires the highest possible level of supervision and monitoring. 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 . . . .

Id. § 14-208.40A(e) (2021).

In support of its contention that this Court should remand, the State cites to *State v. Thomas*, 225 N.C. App. 631, 741 S.E.2d 384 (2013) and *State v. Dye*, 254 N.C. App. 161, 802 S.E.2d 737 (2017). In *Thomas*, a grand jury indicted the defendant on two counts of indecent liberties. *Thomas*, 225 N.C. App. at 632, 741 S.E.2d at 385. The defendant pleaded guilty pursuant to a plea agreement. *Id.* at 632, 741 S.E.2d at 385. The defendant's Static-99 risk assessment was zero, "indicating a low risk of reoffending." *Id.* at 632, 741 S.E.2d at 386.

The trial court, however, made additional findings that the victim was traumatized, the defendant took advantage of a position of trust, and that the

defendant had previously committed a sex offense. *Id.* at 632, 741 S.E.2d at 386. Since those factors "create[d] some concern for the court on the likelihood of recidivism," the trial court ordered the defendant to enroll in SBM for a period of ten years. *Id.* at 632, 741 S.E.2d at 386. On appeal, the defendant argued the trial court erred in determining that he required the "highest level of supervision and monitoring . . ., and that the trial court's 'additional findings' were not supported by the evidence." *Id.* at 633, 741 S.E.2d at 386.

This Court held the trial court "considered improper factors" in determining the defendant required the "highest possible level of supervision." *Id.* at 634, 741 S.E.2d at 387. But because "the State did present evidence which could tend to support a determination of a higher level of risk," this Court vacated the SBM order and remanded the matter to the trial court for a new SBM hearing. *Id.* at 634–35, 741 S.E.2d at 387.

In *Dye*, the jury found the defendant guilty of statutory rape. *Dye*, 254 N.C. App. at 164, 802 S.E.2d at 739. While considering the Static-99R factors at an SBM hearing, the trial court asked the prosecutor "if the decision to order [the d]efendant to enroll in [SBM] was in [the trial court's] discretion," since the defendant scored a "4" on the Static-99. *Id.* at 164, 802 S.E.2d at 739. The prosecutor said it was solely in the trial court's discretion. *Id.* at 164, 802 S.E.2d at 739. But the prosecutor also unsuccessfully attempted to introduce evidence that could have supported a finding the defendant "require[d] the highest possible level of supervision and monitoring."

Id. at 171–72, 802 S.E.2d at 743. The trial court ordered the defendant to enroll in SBM for a period of thirty years. *Id.* at 164, 802 S.E.2d at 739. The defendant appealed, arguing the trial court erred by failing to make adequate findings of fact in the SBM order. *Id.* at 167, 802 S.E.2d at 741.

This Court held the trial court failed to make adequate findings of fact. *Id.* at 171, 802 S.E.2d at 743. But "[g]iven that the State attempted to introduce additional evidence regarding whether the highest level of supervision and monitoring was required, but was unable to do so," this Court remanded the matter to the trial court. *Id.* at 172, 802 S.E.2d at 744.

Here, the State's only evidence was the Static-99R report and three studies attached as exhibits—none of which were conducted in this jurisdiction. In actuality, the studies produced inconsistent results. The State's Exhibit 1 found that "there were no significant differences between [non-GPS] and GPS parolees with regard to criminal sex and assault violations . . . ." Comparatively, the State's Exhibit 2 stated that "the hazard ratio for any arrest is more than twice as high among the subjects who received traditional parole supervision [compared to GPS parolees]." The authors of State's Exhibit 2 noted, however, that the "use of [a Static-99] as the sole criteria for the determination [of high-risk sex offender] status is insufficient."

The State contends that facts are present which could support a finding that SBM was warranted. We disagree, as the State's evidence at the SBM hearing was "too scant to satisfy its burden." *See Greene*, 255 N.C. App. at 783–84, 806 S.E.2d at

345. The State failed to introduce any competent evidence at the SBM hearing and now requests another attempt to escape its shortcomings.

Thus, because the State failed to introduce sufficient evidence at the SBM hearing which could elevate Defendant to the "higher level of risk," and *Thomas* and *Greene* are binding precedent, we hereby vacate the SBM order without remanding to the trial court for additional fact finding. *See Thomas*, 225 N.C. App. at 634–35, 741 S.E.2d at 387; *Dye*, 254 N.C. App. at 172, 802 S.E.2d at 744; *Greene*, 255 N.C. App. at 783–84, 806 S.E.2d at 345. Because we vacate the SBM order based on Defendant's first argument, we need not address Defendant's additional Fourth Amendment argument.

V. Conclusion

We conclude that the State failed to introduce competent evidence at the SBM hearing to support the trial court's imposition of SBM. Therefore, we vacate the trial court's order without remand.

VACATED.

Judge TYSON concurs.

Judge GORE concurs.

Report per Rule 30(e).