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NO. COA11-939  
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Duplin County  
No. 10 CRS 51330

WILLIAM BRENT PARKER

Appeal by defendant from order entered 2 March 2011 by Judge W. Allen Cobb, Jr., in Duplin County Superior Court. Heard in the Court of Appeals 23 January 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Joseph Finarelli, for the State.*

*Michael J. Reece for defendant-appellant.*

ERVIN, Judge.

Defendant William Brent Parker appeals from an order requiring him to register as a sex offender and enroll in a satellite-based monitoring program for the duration of his natural life. On appeal, Defendant contends that the trial court erred by requiring him to register as a sex offender for life and enroll in lifetime SBM based upon a determination that he had been convicted of an aggravated offense. After careful consideration of Defendant's challenges to the trial court's

order in light of the record and the applicable law, we conclude that the trial court's order should be reversed and that this case should be remanded to the Duplin County Superior Court for further proceedings not inconsistent with this opinion.

### I. Factual Background

On 1 March 2011, Defendant entered a plea of guilty to one count of second-degree sexual offense, leading to the entry of a judgment sentencing Defendant to 60 to 81 months imprisonment. On the following day, the trial court conducted a hearing for the purpose of determining whether Defendant should be required to register as a sex offender and enroll in SBM. At the conclusion of that proceeding, the trial court found that Defendant had been convicted of a reportable conviction. Although the trial court found that Defendant was not a sexually violent predator or a recidivist, it determined that Defendant had been convicted of committing an aggravated offense<sup>1</sup> and that the offense for which Defendant had been convicted involved the physical, mental, or sexual abuse of a minor. The trial court concluded that a risk assessment was not necessary because lifetime SBM was required based upon its other findings. As a

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<sup>1</sup>Although the trial court's order states that Defendant's conviction did not stem from the commission of an aggravated offense, both parties agree that this finding is a clerical error given the trial court's announcement at the conclusion of the hearing that Defendant had been convicted of committing an aggravated offense.

result, the trial court ordered Defendant to register as a sex offender and enroll in the SBM program for the duration of his natural life following his release from prison. Although Defendant gave oral notice of appeal from the trial court's order, he has filed an alternative petition for writ of *certiorari* with this Court in which he acknowledges that his notice of appeal was probably deficient. After careful consideration, we conclude that Defendant's *certiorari* petition should be allowed.

## II. Legal Analysis

### A. Satellite-Based Monitoring

In challenging the trial court's order, Defendant contends that the trial court erred by concluding that he had committed an "aggravated offense" and requiring him to enroll in lifetime SBM following his release from prison. According to Defendant, the trial court's determination was erroneous because second-degree sexual offense is not an aggravated offense as defined in N.C. Gen. Stat. § 14-208.6(1a). In its brief, the State concedes that second-degree sexual offense is not an aggravated offense and agrees that the trial court's order should be reversed for that reason. In addition, however, the State contends that this case should be remanded to the trial court for the purpose of determining whether Defendant should be

required to enroll in SBM on the basis of a different legal theory. The State's position has merit.

According to N.C. Gen. Stat. § 14-208.40A, a court determining whether to require a convicted criminal defendant to enroll in SBM must initially ascertain whether the defendant had been convicted of committing a reportable offense. If the answer to that inquiry is in the affirmative, the court must then determine whether the defendant falls into one of the following five categories: "(i) the offender has been classified as a sexually violent predator pursuant to [N.C. Gen. Stat. §] 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of [N.C. Gen. Stat. §§] 14-27.2A or 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor." N.C. Gen. Stat. § 14-208.40A(b). If the court finds that the defendant falls into one of the first four categories, it "shall order the offender to enroll in a satellite-based monitoring program for life." N.C. Gen. Stat. § 14-208.40A(c). If the court determines that the defendant does not fall into one of the first four categories, but that the defendant did commit an offense involving the physical, mental, or sexual abuse of a minor, the court is required to order the Department of Correction to

complete a risk assessment concerning the offender. N.C. Gen. Stat. § 14-208.40A(d). After receiving the risk assessment, the court must determine "whether, based on the Department's risk assessment, the offender requires the highest possible level of supervision and monitoring." N.C. Gen. Stat. § 14-208.40A(e). If the court determines that the defendant requires the highest level of monitoring, it "shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court." *Id.*

In this case, the trial court correctly found that second-degree sexual offense is a reportable offense as defined by N.C. Gen. Stat. § 14-208.6(4). At the next stage of the required analysis, however, the trial court found that Defendant had been convicted of committing an "aggravated offense." The trial court erred in making this determination.

N.C. Gen. Stat. § 14-208.6(1a) defines an "aggravated offense" as any criminal offense which includes either "(i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old." N.C. Gen. Stat. § 14-208.6(1a). Thus, vaginal, anal, or oral penetration must be present in

order for a crime to constitute an "aggravated offense" under either prong of the statutory definition. In *State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009), *disc. review denied*, \_\_\_ N.C. \_\_\_, 703 S.E.2d 738 (2010), we held that, in determining whether a particular crime constitutes an aggravated offense, "the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction." *Id.*

N.C. Gen. Stat. § 14-27.5 provides that:

- (a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:
  - (1) By force and against the will of the other person; or
  - (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.5(a). A "sexual act" consists of "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body. . . ." N.C. Gen. Stat.

§ 14-27.1(4). Thus, "[p]roof of a 'sexual act' under G.S. 14-27.7 does not require, but may involve, penetration." *State v. Hoover*, 89 N.C. App. 199, 208, 365 S.E.2d 920, 926, cert. denied, 323 N.C. 177, 373 S.E.2d 118 (1988). As a result, a second-degree sexual offense conviction may or may not involve penetration. See *State v. Phillips*, \_\_ N.C. App. \_\_, \_\_, 691 S.E.2d 104, 107 (applying the same reasoning in determining whether felonious child abuse constitutes an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a)), disc. review denied, 364 N.C. 439, 702 S.E.2d 794 (2010).

After carefully reviewing the record, we conclude that the trial court erred by determining that Defendant committed an aggravated offense as defined in N.C. Gen. Stat. § 14-208.6(1a). "[W]ithout a review of the underlying factual scenario giving rise to the conviction, which is prohibited under *Davison*," the trial court could not determine whether Defendant's second-degree sexual offense conviction involved vaginal, anal, or oral penetration. *Phillips*, \_\_ N.C. App. at \_\_, 691 S.E.2d at 107 See (internal quotation marks omitted). As a result, we reverse the trial court's order and remand this case to the Duplin County Superior Court for a determination as to whether Defendant should be required to enroll in SBM under an alternative legal theory. In view of the fact that the trial

court has already found that Defendant committed an offense involving the physical, mental, or sexual abuse of a minor, the trial court must, on remand, order the DOC to conduct the required risk assessment, determine whether Defendant requires the highest level of supervision and monitoring, and, if so, require Defendant to enroll in SBM for a term of years. See N.C. Gen. Stat. §§ 14-208.40A(d) and (e).

#### B. Sex Offender Registration

In addition, Defendant challenges the trial court's determination that he must register as a sex offender for the duration of his natural life following his release from prison. As a result of its finding that Defendant was neither a recidivist nor a sexually violent predator, the trial court ordered that Defendant register as a sex offender for life based upon its determination that Defendant had been convicted of committing an aggravated offense. See N.C. Gen. Stat. § 14-208.23 (mandating lifetime registration for an offender who is a recidivist, has been convicted of committing an aggravated offense, or is a sexually violent predator). As a result of the fact that the trial court's determination that Defendant had been convicted of an aggravated offense was in error, we are compelled to conclude that the trial court's decision to require Defendant to register as a sex offender for the duration of his

natural life was erroneous as well. See *Phillips*, \_\_ N.C. App. at \_\_, 691 S.E.2d at 108. However, on remand, the trial court is not precluded from ordering Defendant to register as a sex offender for a period of at least 30 years given that Defendant has been convicted of committing a reportable offense. See N.C. Gen. Stat. § 14-208.7.

### III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by requiring Defendant to register as a sex offender and to enroll in SBM for the duration of his natural life. As a result, we reverse the trial court's order and remand this case to the Duplin County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges ROBERT C. HUNTER and STEPHENS concur.

Report per Rule 30(e).