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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 15-198

Filed: 15 December 2015

Orange County, Nos. 14 CRS 51220–21

STATE OF NORTH CAROLINA

v.

JOSEPH LEWIS MERRICKS

Appeal by Defendant from order entered 14 October 2014 by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 20 October 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

James W. Carter for Defendant-appellant.

BRYANT, Judge.

Where the trial court ordered that Defendant enroll in satellite-based monitoring for his natural life absent a finding that Defendant was a recidivist, that his offense was an aggravated one, or a violation of General Statutes, sections 14-27.2A or 14-27.4A, we reverse the trial court's order. However, because the trial court could have made findings of fact in support of an order for Defendant to enroll in satellite-based monitoring for a term of years, we remand this matter for further proceedings.

STATE V. MERRICKS

Opinion of the Court

Defendant Joseph Lewis Merricks appeals from a satellite-based monitoring (“SBM”) order entered 14 October 2014, requiring him to enroll in SBM for his natural life. The trial court made insufficient findings of fact to support its SBM order and, therefore, we must vacate and remand to the trial court for a new hearing.

Factual and Procedural Background

On 14 October 2014, Defendant entered a guilty plea to two counts each of taking indecent liberties with a child, attempted first-degree sex offense with a child, and disseminating material harmful to a minor. The trial court consolidated Defendant’s convictions and entered a single judgment, sentencing him to a mitigated sentence of 164 to 257 months’ imprisonment.

Following sentencing, the trial court conducted a hearing to address the applicability of SBM, no contact orders, and the sex offender registry. The court entered permanent no contact orders between Defendant and the two victims and ordered Defendant to register as a sex offender for thirty years. In making its determination on the applicability of SBM, the trial court reviewed a STATIC-99 risk assessment prepared by the Division of Adult Correction (“DAC”), which assessed the risk of Defendant’s reoffending as “low.” At the conclusion of the hearing, the trial court found (1) that Defendant’s conviction for indecent liberties with a minor was a “reportable conviction” and (2) the offense involved “the physical, mental or sexual abuse of a minor.” As a result of these findings, the trial court ordered Defendant to

STATE V. MERRICKS

Opinion of the Court

enroll in SBM for his natural life. The trial court did not reference Defendant's STATIC-99 score in its order, nor did it make any additional findings of fact in support of its determination. Defendant filed timely written notice of appeal from the SBM order.

On appeal, Defendant raises three questions: (I) whether the trial court erred by determining that Defendant required the highest level of supervision and monitoring; (II) whether the trial court lacked authority to order Defendant to enroll in SBM for life; and (III) whether the trial court's decision was arbitrary and capricious.

I & II

On appeal, Defendant raises two arguments regarding the trial court's SBM order. Specifically, Defendant contends that the trial court erred in ordering that he enroll in SBM. Alternatively, Defendant argues that the court erred in ordering him to enroll in SBM for his natural life. We agree.

Initially, we note that the State concedes the evidence before the trial court was insufficient to support an order for lifetime SBM. However, the State further contends that the evidence presented could support an order requiring Defendant to enroll in SBM for a term of years. Thus, the State requests that the matter be remanded for further proceedings.

STATE V. MERRICKS

Opinion of the Court

In ordering an offender to enroll in SBM, “the trial court is statutorily required to make findings of fact to support its legal conclusions.” *State v. Morrow*, 200 N.C. App. 123, 126, 683 S.E.2d 754, 757 (2009), *aff’d per curiam*, 364 N.C. 424, 700 S.E.2d 224 (2010). On appeal, this Court “review[s] the trial court’s findings of fact to determine whether they are supported by competent record evidence[.]” *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (citation and quotation marks omitted). Additionally, 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. Jones*, ___ N.C. App. ___, ___, 758 S.E.2d 444, 447 (2014) (quoting *State v. Clark*, 211 N.C. App. 60, 70, 714 S.E.2d 754, 761 (2011)).

North Carolina General Statutes, section 14-208.40A(c) provides that a court shall order an offender to enroll in *SBM for his natural life* if it determines that an offender (1) is classified as a sexually violent predator, (2) is a recidivist, (3) has committed an aggravated offense, or (4) is convicted under N.C. Gen. Stat. §§ 14-27.2A or 14-27.4A. N.C. Gen. Stat. § 14-208.40A(c) (2013). Here, the trial court made specific findings of fact that Defendant did not fall within any of the four categories enumerated within section 14-208.40A(c). Absent other authority, we hold it was error for the trial court to order Defendant to enroll in SBM for his natural life.

However, the court shall order the offender to enroll in *SBM for a period of time to be specified by the court*, if it finds that the offender committed an offense

STATE V. MERRICKS

Opinion of the Court

which involved the physical, mental, or sexual abuse of a minor; that the offender is not a recidivist; that the offense is not an aggravated offense or violation of G.S. 14-27.2A of G.S. 14-27.4A; and that based on the risk assessment performed by DAC the offender requires the highest level of supervision and monitoring. *Id.* § 14-208.40A(d), (e).

Here, the court found that Defendant's offense involved the physical, mental or sexual abuse of minor. The court further found that Defendant was not a recidivist and that the offense was not an aggravated offense or a violation of G.S. § 14-27.2A or G.S. § 14-27.4A. However, DAC's risk assessment of Defendant was "low."

Where DAC's risk assessment determines that an offender poses "only a low or moderate risk of reoffending, the State must offer additional evidence, and the trial court make additional findings, in order to justify a maximum SBM sentence." *State v. Thomas*, ___ N.C. App. ___, ___, 741 S.E.2d 384, 387 (2013) (citations omitted). This Court has affirmed an SBM order based on the trial court's findings that the defendant committed multiple crimes close together in time, all the victims were young girls, and there was evidence that the defendant's aggressive conduct was escalating. *State v. Smith*, ___ N.C. App. ___, ___, 769 S.E.2d 838, 841 (2015). Similarly, in *State v. Green*, 211 N.C. App. 599, 710 S.E.2d 292 (2011), this Court affirmed an order requiring the defendant to enroll in the SBM program for a period of five years based on the findings that the victims were very young and that the defendant did

STATE V. MERRICKS

Opinion of the Court

not receive any sex offender treatment. 211 N.C. App. at 604–05, 710 S.E.2d at 296–97. Here, the trial court failed to make any additional, relevant findings of fact.

Notwithstanding the absence of the necessary factual findings in the trial court’s order, the record contains evidence upon which a court may base findings of fact in support of SBM for a term of years. *See id.* at 603, 710 S.E.2d at 295 (“[T]he trial court may properly consider evidence of the factual context of a Defendant’s conviction when making additional findings as to the level of supervision required of a Defendant convicted of an offense involving the physical, mental, or sexual abuse of a minor.”). Accordingly, we deem it appropriate to reverse and remand this matter “to the trial court for additional evidentiary proceedings and more thorough findings of fact as to the level of Defendant’s risk” based on the evidence presented at the original SBM hearing or in the record at the time of the original SBM hearing. *Morrow*, 200 N.C. App. at 133, 683 S.E.2d at 762.

Because we reverse and remand this matter to the trial court based on an analysis of the arguments presented in Issues I and II, we need not address the argument Defendant raises in Issue III.

REVERSED AND REMANDED.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).