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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-539

Filed: 6 February 2018

Brunswick County, Nos. 15 CRS 56227, 56234

STATE OF NORTH CAROLINA

v.

MICHAEL CHARLES JACOBS

Appeal by defendant from judgments and orders entered 4 January 2017 by Judge James G. Bell in Brunswick County Superior Court. Heard in the Court of Appeals 2 January 2018.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

BRYANT, Judge.

Where the trial court ordered that defendant enroll in a satellite-based monitoring (SBM) program for life based upon an erroneous conclusion that defendant's conviction for second-degree sexual offense qualified as an aggravated offense as defined by N.C. Gen. Stat. § 14-208.6(1a), we vacate the trial court's

lifetime SBM order and remand the matter for a new trial to determine if defendant qualifies for SBM for a term of years. We also remand for correction of a clerical error on one of the trial court's no-contact orders.

On 2 May 2016, defendant was charged by bills of indictment with three counts of first-degree sex offense with a child, two counts of taking indecent liberties with a child, and one count of second-degree sex offense.[1] Defendant entered into a plea arrangement with the State, under the terms of which he agreed to plead guilty to two counts of second-degree sex offense. In exchange, the State agreed to dismiss a number of charges. On 4 January 2017, the trial court accepted defendant's guilty plea and sentenced him to two consecutive terms of 58 to 130 months, in accordance with the terms of the plea arrangement.

Immediately after sentencing, the trial court conducted a hearing to determine defendant's eligibility for satellite-based monitoring. The trial court found that defendant was not a sexually violent predator or a recidivist, but that the offense of conviction was an aggravated offense and involved the physical, mental, or sexual abuse of a minor. Therefore, the trial court ordered defendant to enroll in an SBM program upon his release from prison for the duration of his natural life. The trial

[1] Defendant contends that he was charged with 40 counts total, and his transcript of plea indicates that 38 charges were dismissed. However, the record only includes indictments for the above-listed offenses.

court also entered two permanent no-contact orders, which prohibit defendant from having any contact with his victims.

On 12 January 2017, defendant filed a *pro se* notice of appeal that fails to fully comply with the requirements of N.C.R. App. P. 3. Defendant, however, has filed an alternative petition for writ of certiorari acknowledging that his notice of appeal is deficient. In the interest of justice, we hereby allow his petition.

In his first argument, defendant contends that the trial court erroneously concluded that second-degree sex offense was an aggravated offense requiring defendant to enroll in SBM for the remainder of his life. Defendant argues that the elements of the offense for which he was convicted, second-degree sexual offense, do not meet the statutory definition of an aggravated offense as defined by N.C. Gen. Stat. § 14-208.6(1a) (2015). The State concedes that second-degree sexual offense is not an aggravated offense and argues that the matter should be remanded for a new hearing to determine whether defendant is eligible for enrollment in SBM for a period of years. We agree.

Under the framework of N.C. Gen. Stat. § 14-208.40A (2015), a trial court is required to order an offender to enroll in SBM for the remainder of his life if the trial court finds one of the following: (1) the offender has been classified as a sexually violent predator; (2) the offender is a recidivist; (3) the conviction offense was an

aggravated offense; or (4) the offender was convicted of rape of a child pursuant to N.C. Gen. Stat. § 14-27.23 or sex offense with a child pursuant to N.C. Gen. Stat. § 14-27.28. N.C. Gen. Stat. § 14-208.40A(a)-(c) (2015).

If the trial court determines that the defendant committed an offense which involves the physical, mental, or sexual abuse of a minor but not an aggravated offense or an offense in violation of General Statutes, sections 14-27.23 or 14-27.28, the trial court is required to order the Division of Adult Correction to complete a risk assessment of the offender. *Id.* § 14-208.40A(d). Upon receipt of the risk assessment, the court is required to determine whether "the offender requires the highest possible level of supervision and monitoring." *Id.* § 14-208.40A(e). If the court determines that the defendant requires the highest level of monitoring, the court "shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court." *Id.*

Here, the trial court erroneously found that second-degree sex offense, the offense for which defendant was convicted, was an aggravated offense. North Carolina General Statute § 14-208.6(1a) defines "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.

Id. § 14-208.6(1a). Thus, under either prong of the definition, penetration is necessary to a finding that the offense is aggravated. This Court has held that in determining whether an offense is 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." *State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009).

Defendant was convicted of second-degree sexual offense in violation of N.C. Gen. Stat. § 14-27.5,[2] which provides that a person is guilty of the offense if he "engages in a sexual act with another person" (1) "[b]y force and against the will of the other person," or (2) "[w]ho 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) (2013). The term "sexual act" is further defined as "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) (2013).[3] "[I]t is clear that a sexual act constituting a second-degree

[2] Section 14-27.5 was recodified as N.C. Gen. Stat. § 14-27.27 (2015) by Session Law 2015-181, § 9(a), with an effective date of 1 December 2015, and applicable to offenses committed on or after the effective date. Here, defendant's offenses were committed prior to the effective date.

[3] Section 14-27.1 was also recodified as N.C. Gen. Stat. § 14-27.20 (2015) by Session Law 2015-181 (section 2).

sexual offense does not require, but may involve, penetration." *State v. Boyett*, 224 N.C. App. 102, 117, 735 S.E.2d 371, 381 (2012) (citation omitted), *superseded in part*, 229 N.C. App. 576, 747 S.E.2d 739 (2013). Thus, penetration is not a required element for second-degree sex offense. This Court also held in *Boyett* that "the elements of second-degree sexual offense do not 'fit within' the statutory definition of 'aggravated offense' " because penetration is not a required element for conviction. *Id.* at 118, 735 S.E.2d at 381.

Based on the authority of *Boyett*, we conclude that the trial court erroneously found defendant was convicted of an aggravated offense and consequently, improperly ordered defendant to enroll in SBM for the remainder of his natural life. Accordingly, we must vacate the trial court's SBM order and remand for a new hearing to determine whether defendant is eligible for enrollment in SBM for a period of years. *See* N.C. Gen. Stat. § 14-208.40A(d), (e).

Defendant also argues that he is entitled to a new hearing pursuant to *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015) (per curiam). In *Grady*, the United States Supreme Court held that North Carolina's SBM program effects a Fourth Amendment search. *Id.* at ___, 191 L. Ed. 2d at 462. However, the Supreme Court noted that the Fourth Amendment prohibits only unreasonable searches, and our courts had not determined whether SBM monitoring was reasonable. *Id.* This Court subsequently held that the trial court must "determine, based on the totality

of the circumstances, if the SBM program is reasonable when properly viewed as a search." *State v. Blue*, ___ N.C. App. ___, ___, 783 S.E.2d 524, 527 (2016). Therefore, this Court has remanded cases to the trial court to conduct reasonableness hearings pursuant to *Grady*. *See, e.g., id.*; *State v. Collins*, ___ N.C. App. ___, 783 S.E.2d 9, 16 (2016).

Here, however, we have already determined that the SBM order must be vacated and that defendant is entitled to a new hearing. Should the trial court determine that SBM for a period of years is warranted, such would constitute a new and different search, and defendant would be entitled to challenge the reasonableness of that search pursuant to *Grady*. Accordingly, we need not address defendant's *Grady* argument in this appeal. *See State v. Dye*, ___ N.C. App. ___, ___, 802 S.E.2d 737, 744 (2017) ("In light of our determination that the SBM order must be vacated and remanded for a new hearing, we do not address Defendant's argument that the SBM order must also be vacated because enrollment in SBM violated Defendant's right to be free from unreasonable searches under . . . *Grady*. . . ."). Therefore, we dismiss defendant's argument.

In his final argument, defendant contends that the case should be remanded for correction of a clerical error on one of the trial court's no-contact orders. We agree.

The trial court entered two permanent no-contact orders prohibiting defendant from having any contact with his victims. Both of the orders contain a "Conclusions

of Law" section, in which the trial court must check a box indicating either that "reasonable grounds exist for the victim to fear any future contact with the defendant," or that "reasonable grounds do NOT exist for the victim to fear any future contact with the defendant." In one of the orders, the trial court neglected to check either box. Given that the order in question made findings regarding the nature of defendant's criminal offense against the victim, and that the order ultimately prohibits defendant from contacting the victim, we conclude that the trial court's failure to check the appropriate box on the no-contact order was indeed a clerical error. We therefore remand for correction of the clerical error so that the record may "speak the truth." *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation omitted).

VACATED AND REMANDED; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges HUNTER, JR., and INMAN concur.

Report per Rule 30(e).