IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-751

Filed: 6 March 2018

Orange County, No. 16 CRS 50130

STATE OF NORTH CAROLINA

v.

LORI STOIN FREEMAN

Appeal by defendant from judgment entered 6 January 2017 by Judge R. Allen Baddour, Jr. in Orange County Superior Court. Heard in the Court of Appeals 24 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

CALABRIA, Judge.

Where the trial court declined to find that defendant's prior federal conviction was substantially similar to a North Carolina offense, the trial court erred in finding that defendant committed a "sexually violent offense" and that defendant was a recidivist. We remand this matter for resentencing.

I. Factual and Procedural Background

On 22 February 2016, Lori Freeman ("defendant") was indicted by grand jury in Orange County for first-degree sex offense with a child under the age of 13. On 29 December 2016, in the federal court of the Middle District of North Carolina, defendant pleaded guilty to three counts of production of child pornography. This plea agreement required defendant, *inter alia*, to register as a sex offender in North Carolina. On 6 January 2017, defendant pleaded guilty on state charges to the lesser offense of attempted first-degree sex offense with a child under the age of 13. In exchange, the State dismissed multiple charges of sexual exploitation of a minor.

The trial court found that defendant had a prior Class H or I felony conviction, and a prior felony record level of 2, based on defendant's federal conviction for production of child pornography. The trial court sentenced defendant to a minimum of 175 and a maximum of 270 months in the custody of the North Carolina Department of Adult Correction, to run concurrently with defendant's federal sentence.

The trial court entered additional findings in its judgment, finding that (1) the offense was a sexually violent offense, (2) defendant was a recidivist, and (3) the offense was not an aggravated offense. The trial court ordered that, in addition to her sentence, defendant be subject to satellite-based monitoring ("SBM") for the remainder of her natural life.

Defendant appeals.

II. Findings of Fact

Defendant takes issue with two of the trial court's findings of fact, which we shall address in turn.

A. Standard of Review

> Generally, [w]hen a defendant assigns error to the sentence imposed by the trial court our standard of review is whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing. When this Court is confronted with statutory errors regarding sentencing issues, such errors are questions of law, and as such, are reviewed *de novo*.

State v. Allen, ___ N.C. App. ___, ___, 790 S.E.2d 588, 591 (2016) (citations and quotation marks omitted).

The determination of whether a conviction from another jurisdiction is substantially similar to a North Carolina offense is a question of law. *State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014).

B. Sexually Violent Offense

In her first argument, defendant contends that the trial court erred in finding that she committed a "sexually violent offense" without finding that her federal conviction was substantially similar to a North Carolina offense. We agree.

At trial, the State argued that the federal charge of which defendant was convicted, production of child pornography, was substantially similar to N.C. Gen. Stat. § 14-190.16(a)(1). That statute, regarding sexual exploitation of a minor,

provides that a violation constitutes a Class C felony. Defendant disagreed, arguing that it fell under N.C. Gen. Stat. § 14-190.6, which governs employing minors in immoral acts, a Class I offense. The trial court held:

> Okay. I think for purposes of this hearing, I will just find it as a Class I, not make a finding regarding substantial similarity.

On appeal, defendant contends that the trial court "failed to make a finding that [defendant]'s federal conviction was substantially similar to a North Carolina offense. Absent such a finding, the federal conviction could not serve as a prior 'sexually violent offense' triggering 'recidivist' status and lifetime registration."

A "sexually violent offense" is defined by N.C. Gen. Stat. § 14-208.6(5) (2015) as a violation of one of an explicit list of statutes, including, *inter alia*, N.C. Gen. Stat. § 14-190.6, employing or permitting a minor to assist in offenses against public morality and decency. A violation of N.C. Gen. Stat. § 14-190.6 is explicitly a sexually violent offense pursuant to N.C. Gen. Stat. § 14-208.6. At trial, defendant argued that her prior federal conviction was substantially similar to N.C. Gen. Stat. § 14-190.6.

Notwithstanding the fact that a defendant will not be heard to complain on appeal of relief that the defendant requested, defendant nonetheless contends that the trial court failed to enter a finding on her argument.

We have previously held that, where the trial court fails to make a finding on substantial similarity, the case must be remanded to make such a determination. *State v. Fortney*, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010). Accordingly, we remand this matter for the trial court to enter an explicit determination of whether defendant's prior federal conviction is substantially similar to a North Carolina offense. The trial court may then determine whether defendant's prior conviction was for a "sexually violent offense."

C. Recidivist

In her second argument, defendant contends that the trial court erred in finding that she was a recidivist. We agree.

Under North Carolina law, a "recidivist" is a person who has a "reportable conviction" on her record. N.C. Gen. Stat. § 14-208.6(2b). A "reportable conviction" is, *inter alia*, a conviction for a sexually violent offense under North Carolina law, or a substantially similar offense under the laws of another jurisdiction. N.C. Gen. Stat. § 14-208.6(4). As we held above, the trial court failed to make any findings on whether defendant's prior federal conviction was substantially similar to a North Carolina offense. Absent such a finding, the trial court had no basis upon which to find that defendant was a recidivist.

On remand, after determining whether defendant's prior federal conviction was substantially similar to a North Carolina offense, and whether it constituted a

"sexually violent offense," the trial court shall then determine whether defendant is a recidivist under N.C. Gen. Stat. § 14-208.6(2b).

III. Reasonable Search

In her third argument, defendant contends that the State failed to present sufficient evidence that the imposition of lifetime SBM constituted a reasonable search, and therefore that the trial court erred in imposing lifetime SBM.

A. Standard of Review

North Carolina's SBM program effects a continuous warrantless search of the enrollee. *Grady v. North Carolina*, ___ U.S. ___, ___, 191 L. Ed. 2d 459, 460-62 (2015). Consequently, trial courts must conduct a hearing on the question of whether imposition of SBM is reasonable pursuant to a Fourth Amendment analysis. *Id.* The State bears the burden of demonstrating that the imposition of SBM constitutes a reasonable search. *State v. Blue*, ___ N.C. App. ___, ___, 783 S.E.2d 524, 527 (2016).

B. Analysis

After its sentencing hearing, the trial court held a hearing on SBM. The State offered the following argument:

> I think counsel indicated to me that I also have to prove whether or not it's reasonable if the Court [imposes SBM]. I -- I'm sorry. I struggle with this case, but I -- I do think it's, at this juncture, reasonable based on a little bit of what [defense counsel] said in terms of [defendant]'s inability at least at this point to not follow those that clearly were leading her to some place that was pretty dangerous. And that's what makes the State a little nervous.

> So I read the report. And maybe in and of herself she may not [be] what we would consider a pedophile, but I think she has unfortunately demonstrated that she is in high impressionability to unfortunately be led there. So I think that because of that that it would make it reasonable in addition to the fact that I think she is a recidivist at this juncture.

The State's arguments refer to defense counsel's earlier statements that defendant did not engage in these acts of her own desire, but was rather manipulated into doing so by others. Defendant then offered arguments, and the trial court concluded that defendant should be subject to lifetime SBM.

On appeal, defendant contends that the State failed to present any evidence with respect to reasonableness, and the trial court failed to make any findings with respect to the Fourth Amendment. The State, on appeal, concedes that it failed to meet its burden at the hearing. We hold, accordingly, that the trial court erred in entering its order imposing lifetime SBM, and vacate that order.

We note that this matter is remanded for resentencing on other issues. However, we have recently held that, where the State fails to produce sufficient evidence of the reasonableness of the imposition of SBM, the State is not entitled to "try again" on remand. *See State v. Greene*, ___ N.C. App. ___, 806 S.E.2d 343 (2017). As such, although this matter is remanded for resentencing, the issue of SBM is vacated absolutely; the State is not entitled to a new hearing on this issue.

VACATED AND REMANDED.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).